Supreme Court
FILED

961969 JUN 10 1997.

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No. 96-

IN THE
UNITED STATES SUPREME COURT
October Term, 1996

RIVER OAKS FURNITURE, INC., *et al.*

Petitioners,

v.

HAROLD S. ANSIN, *et al.*

Respondents.

On Petition For Writ of Certiorari
to The United States Court of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

UNDER SECTION 28 OF THE SECURITIES EXCHANGE ACT OF 1934, MUST OUT OF POCKET DAMAGES FOR SECURITIES FRAUD IN VIOLATION OF SECTION 10(b) AND RULE 10b-5 THEREUNDER BE MEASURED AS OF THE DATE ON WHICH THE PLAINTIFFS SOLD THEIR SHARES IN THE OFFENDING TRANSACTION, WHERE DEFENDANTS HAVE REALIZED NO PROFIT ON ANY RESALE?

THE COURT OF APPEALS ANSWERED THIS QUESTION IN THE NEGATIVE.

II.

IN AN ACTION WHICH SEEKS RECOVERY FOR FEDERAL SECURITIES FRAUD IN CONNECTION WITH PLAINTIFFS' SALE OF SHARES OF A COMPANY'S COMMON STOCK, AND FOR BREACH OF CONTRACT AGAINST THE COMPANY FOR HAVING REDUCED THE NUMBER OF SUCH SHARES SEVERAL YEARS BEFORE PLAINTIFFS' SALE, MUST THE JURY BE INSTRUCTED AS TO WHEN THE SHARES ARE TO BE VALUED FOR PURPOSES OF COMPUTING DAMAGES?

ALTHOUGH COUNSEL PROPERLY OBJECTED TO THE DISTRICT COURT'S FAILURE SO TO INSTRUCT THE JURY, THE COURT OF APPEALS AFFIRMED THE JURY'S AWARD OF DAMAGES FOR BOTH SECURITIES FRAUD AND BREACH OF CONTRACT.

III

A DECEASED FORMER SHAREHOLDER IS ALLEGED TO HAVE BEEN THE VICTIM OF A FRAUDULENT NONDISCLOSURE IN VIOLATION OF SECTION 10(b) OF THE SECURITIES EXCHANGE ACT AND RULE 10b-5 THEREUNDER. THE DEFENDANT TESTIFIES, WITHOUT CONTRADICTION, THAT HE ADVISED THE DECEASED OF THE ONLY INFORMATION WHICH THE JURY FINDS WAS NOT DISCLOSED. MAY A VERDICT AGAINST THE DEFENDANT FOR SUCH NONDISCLOSURE BE SUSTAINED?

THE COURT OF APPEALS AFFIRMED THE JUDGMENT BASED UPON SUCH VERDICT.

IV

A CORPORATION IS ALLEGED TO HAVE BREACHED A CONTRACTUAL OBLIGATION, EMBODIED IN ITS CHARTER, SUBSCRIPTION AGREEMENT AND BY-LAWS, BY REDUCING THE NUMBER OF SHARES AND PERCENTAGE INTEREST OF A DECEASED SHAREHOLDER. MAY A JURY VERDICT AGAINST THE CORPORATION BE SUSTAINED WHERE (A) AN OFFICER AND DIRECTOR OF THE CORPORATION TESTIFIES, WITHOUT CONTRADICTION, THAT THE DECEASED AGREED TO SUCH REDUCTION; (B) THE CORPORATION ISSUED A CERTIFICATE FOR THE REDUCED NUMBER OF SHARES TO THE DECEASED'S VENDEE

WHO ACCEPTED THE CERTIFICATE WITHOUT COMPLAINT AND FILED TAX RETURNS ON THE BASIS OF THE REDUCED INTEREST; (C) THE DECEASED AGREES TO REPURCHASE THE VENDEE'S SHARES; AND (D) BOTH THE VENDEE AND THE DECEASED THEN AGREE TO RESELL THE SHARES TO THE CORPORATION AT A PRICE BASED ON THE REDUCED PERCENTAGE, AND BOTH THE DECEASED AND THE VENDEE EXECUTE STOCK POWERS FOR THE REDUCED NUMBER OF SHARES.

THE COURT OF APPEALS AFFIRMED THE VERDICT THAT THE CORPORATION WAS GUILTY OF BREACH OF CONTRACT.

PARTIES TO THE PROCEEDING

The petitioners in the case at bar include River Oaks Furniture, Inc., Stephen L. Simons and Thomas D. Keenum, Sr. The respondents in the case at bar include Harold S. Ansin, individually and as Trustee of the Ansin Foundation; Patrick B. Maraghy, as Trustee of the Ansin Foundation; Joseph L. Ansin, as Trustee of the Ansin Foundation; and Richard N. Thielen, as Executor of the Estate of Lawrence J. Ansin.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Jurisdiction of the District Court 2

B. Statement of Facts 2

REASONS FOR GRANTING THE WRIT 9

A. The Opinion of the Court of Appeals Not Only Presents an Important Question of Federal Law That Has Not Been, But Should Be, Addressed by the Court, But Also Decides That Question In a Way Which Conflicts with the Relevant Decision of This Court 9

1. This Case Presents an Important Question of Federal Law That Has Not Been, But Should Be, Addressed by This Court 9

2. The Court of Appeals' Decision Conflicts With *Affiliated Ute Citizens* 11

B. The Opinion Below Conflicts With Those of a Number of Other United States Courts of Appeal on This Important Issue 14

C. The Opinion Sanctions an Abrupt and Extremely Serious Departure by the District Court From the Usual Course of Judicial Proceedings, in That the Jury Was Left to Speculate as to Damages and Other Elements of Plaintiffs' Claim, and the Verdicts Could Only Have Been the Product of Rank Speculation 17

1. Speculation as to Damages 18

2. Speculation as to Other Elements of Plaintiffs' Claims 20

a. Securities and Common Law Fraud 20

b. Breach of Contract 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Affiliated Ute Citizens v. United States,
406 U.S. 128 (1972) 9, 10, 11, 12, 13, 14, 15, 16, 19, 23

Austin v. Loftsgaarden,
675 F.2d 168 (8th Cir. 1982), *cert. granted,*
474 U.S. 978 (1985), *rev'd and remanded,*
478 U.S. 647 (1986) 14

Basic, Inc. v. Levinson,
485 U.S. 224 (1988) 21

Estate Counseling Serv., Inc. v.
Merrill Lynch, Pierce, Fenner & Smith, Inc.,
303 F.2d 527 (10th Cir. 1962) 15

Green v. Occidental Petroleum Corp.,
541 F.2d 1335 (9th Cir. 1976) 15

Janigan v. Taylor,
344 F.2d 781 (1st Cir.), *cert. denied,*
382 U.S. 879 (1965) 10, 13, 14, 15, 20

Jordan v. Duff & Phelps, Inc.,
815 F.2d 429 (7th Cir. 1987), *cert.*
dismissed, 485 U.S. 901 (1988) 16, 18, 19, 23

Levine v. Seilon, Inc.,
439 F.2d 328 (2d Cir. 1971) 15

Moore v. Chesapeake & O.R. Co.,
340 U.S. 573 (1951) 17, 20, 22

Myzel v. Fields,
386 F.2d 718 (8th Cir. 1967), *cert. denied*,
390 U.S. 951 (1968) 9, 15

Nickels v. Koehler Management Corp.,
541 F.2d 611 (6th Cir. 1976), *cert. denied*,
429 U.S. 1074 (1977) 15

Randall v. Loftsgaarden,
478 U.S. 647 (1986) 13

Siebel v. Scott,
725 F.2d 995 (5th Cir.), *cert. denied*,
467 U.S. 1242 (1984) 14, 15

Sigafus v. Porter,
179 U.S. 116 (1900) 10, 15

TSC Indus., Inc. v. Northway, Inc.,
426 U.S. 438, *motion dismissed*,
429 U.S. 810 (1976) 21

Statutes

15 U.S.C. § 78j(b) 1, 8, 9, 13, 19
15 U.S.C. § 78aa 2
15 U.S.C. § 78bb(a) 1, 9, 10, 13, 14, 19, 23
15 U.S.C. § 1367 2
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 2
28 U.S.C. § 1332 2

Rules

17 C.F.R. § 240.10b-5 . . . . . 1, 8, 9, 13, 19

Secondary Authorities

5D Jacobs, Arnold S., *Litigation and Practice Under Rule 10b-5* §260.03[c][ii] 10

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered March 13, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals, which is printed in Appendix A, *infra*, at p. 1a, is reported *sub nom, Ansin v. River Oaks Furniture, Inc.*, 105 F.3d 745 (1st Cir. 1997). The opinion is also reported at [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,417.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on February 3, 1997. An Order denying rehearing was entered on March 13, 1997 (Appendix E, p. 45a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 10(b) and 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78bb(a), respectively, and Rule 10b-5 issued by the Securities and Exchange Commission under such Act, 17 C.F.R. §§ 240.10b-5, are set forth in Appendix H.

STATEMENT OF THE CASE

A. Jurisdiction of the District Court.

The bases for jurisdiction in the United States District Court for the District of Massachusetts were 28 U.S.C. §1331 (federal question); §27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa; 28 U.S.C. §1367 (supplemental jurisdiction); and 28 U.S.C. §1332 (diversity of citizenship).

B. Statement of Facts.

In this Petition, petitioners and respondents will be referred to, respectively, as "plaintiffs" and "defendants," their capacity in the District Court.

Plaintiffs brought this action to recover alleged damages for federal securities fraud and common law fraud in connection with a November, 1992 sale to defendant River Oaks Furniture, Inc. ("River Oaks") by Lawrence[1] and Harold Ansin, and the Ansin Foundation, of shares of stock in River Oaks ("the Ansin shares"). Plaintiffs also sought to recover damages on other theories, including a claim for breach of contract by River Oaks for a 1989 reduction of the number and percentage of the Ansin shares.

River Oaks was formed in 1987 by Lawrence Ansin, defendants Stephen L. Simons and Thomas D. Keenum, Sr., and five other founders, all of whom had extensive experience in the furniture industry. It was the intention of all the founders to attempt to conduct an initial public

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[1] Lawrence Ansin died between the date of the offending transaction and the filing of this action, and his estate is a plaintiff.

offering ("IPO") of River Oaks' shares at the earliest possible time.

Under the River Oaks Subscription Agreement, Lawrence Ansin and defendant Steve Simons were the only Class I shareholders and were issued, respectively, 7,500 shares (10%) and 30,000 shares (40%) of the total of 75,000 shares originally outstanding. Simons held the right to vote Lawrence Ansin's shares. Lawrence paid $100,000 for his interest in the enterprise.

By a written agreement dated in early 1988, Lawrence Ansin sold his interest in River Oaks to his father Harold for $100,000, in a transaction which was not disclosed to defendants until early 1989. According to Harold, the reason for this transaction was that Lawrence was entering into an agreement to sell his furniture fabric manufacturing company, under the terms of which Lawrence would be prohibited from owning any interest in any furniture company until January 1, 1995. Lawrence continued to execute personal guarantees of River Oaks' indebtedness on its line of credit to the Bank of Mississippi, which was guaranteed by all of the other founding shareholders. In early 1989, River Oaks issued 25,000 additional shares to several new shareholders, which had the effect of reducing the Ansin interest to 6%. Simons testified that at about the same time, he and Lawrence Ansin negotiated a reduction in the Ansin interest to 4%, and Lawrence asked that the new stock certificate be issued in the name of his father, Harold. River Oaks issued a new stock certificate for 4,000 shares to Harold, and began issuing K-1 federal tax forms to Harold reflecting that he held a 4% interest.

In early 1991, Harold and Lawrence entered into a Stock Repurchase Agreement, under which Lawrence (or his

estate) had the right to repurchase all of Harold's River Oaks shares for $200,000 at any time after January 1, 1995, the date on which Lawrence's noncompetition agreement was to expire.

In approximately April of 1992, River Oaks consulted an investment banker, J.C. Bradford & Co. ("Bradford") about the possibility of an IPO. Bradford advised River Oaks that it was not a candidate for an IPO at that time, but that Bradford would be willing to reconsider the possibility in 1993. Simons testified that he advised Lawrence Ansin that River Oaks was consulting an investment banker about a possible IPO, although he did identify Bradford by name.

At about this same time, Lawrence Ansin learned that he had a brain tumor. While Lawrence continued to make all business decisions, the Ansin family financial advisor, Patrick Maraghy, began representing him in business negotiations.

Following the inconclusive discussions with Bradford, River Oaks sought to increase the amount of its line of credit with the Bank of Mississippi, which requested additional personal guarantees from the shareholders. River Oaks contacted Lawrence relative to executing new guarantees, and was referred to Maraghy because of Lawrence's illness. Maraghy advised River Oaks that Lawrence would not sign any additional guarantees. Harold also refused to sign the guarantees. Thereafter, Simons and defendant Thomas Keenum, who were both officers and directors of River Oaks, negotiated with the Ansins through Maraghy for a purchase by River Oaks of the 4% Ansin interest represented by 4,000 shares. At no time during these discussions did either Maraghy or the Ansins question the 1989 reduction in the number of shares or percentage of the Ansin interest. A

sales price of $300,000 was agreed upon which, according to Maraghy's own notes, represented $75,000 for each percent owned by the Ansins. As part of the transaction, Lawrence was to be released from his personal guarantees of River Oaks' indebtedness. Included in this sale were Lawrence's shares in a real estate holding company, R O Realty. For tax reasons, the Ansins executed stock powers for 4,0000 River Oaks shares transferring the shares to the Ansin Foundation, of which the Ansins were trustees, and from that Foundation to River Oaks. At the time of the transaction, there were no ongoing discussions with Bradford.

River Oaks almost immediately resold all of the shares, at the same price per share it had paid plaintiffs, to four (4) of its existing eleven (11) shareholders. Simons did not purchase any of these shares; Keenum purchased (and still owns) 1,000 of the shares for $75,000.

On March 1, 1993 the River Oaks board approved an attempted IPO of River Oaks shares.

In June of 1993, Lawrence Ansin died. In late June of 1993, River Oaks filed a form S-1 with the Securities and Exchange Commission for an intended public offering of its shares. Patrick Maraghy and Harold Ansin learned of the filing of the S-1 in June, but made no inquiry of defendants. In late August of 1993, River Oaks conducted a successful public offering of its shares to the public. Neither the individual defendants nor any other River Oaks shareholder sold shares in the IPO, and none of the shares representing the Ansin shares were sold in the IPO.

On October 4, 1993, plaintiffs filed this suit alleging that defendants had committed securities fraud and other

wrongs in connection with the purchase of the Ansin's 4,000 shares. Plaintiffs alleged several misrepresentations as well as failure to advise the Ansins that River Oaks had consulted Bradford about the possibility of an IPO. Plaintiffs later amended their suit to allege that the reduction of the Ansin interest by 3,500 shares in 1989 was not authorized, and constituted conversion. The District Court granted summary judgment dismissing the conversion claim as barred by the statute of limitations, finding that the Ansins were on notice that their holdings had been reduced to 4,000 shares or 4% prior to selling their shares to River Oaks in November of 1992. (The memorandum opinion of the District Court granting partial summary judgment is reproduced in Appendix D, p. 37a.) However, plaintiffs were permitted to amend their complaint to allege that such reduction violated the charter, by-laws and subscription agreement of River Oaks.

At the trial, Simons testified, without contradiction, that in April of 1992, he had advised Lawrence Ansin that River Oaks was consulting an investment banker about a possible IPO. Since Lawrence Ansin was deceased, there was, of course, no testimony concerning what Lawrence Ansin knew, or did not know, concerning the likelihood or timing of a possible IPO.

The District Judge instructed the jury that any damages to be awarded for either securities fraud in connection with River Oaks' purchase of the Ansin's 4,000 shares, or breach of contract in the reduction of the Ansin interest by 3,500 shares, should be the calculated in the same way and should be measured by

> the difference between what the Ansins actually received for their stock and what you believe they

> would have received had they refused to sell or, instead, insisted on different terms.

(Appendix F, p. 48a.) Defendants' counsel objected because the instruction did not specify the time at which the shares must be valued, invited speculation, and seemed to suggest that the jury might award damages on the basis of the IPO which occurred some ten months after the Ansins sold their interest. (Appendix F, pp. 50a-51a.) The court refused to clarify the instruction. (Appendix F, p. 51a.)

The case was submitted to the jury on special interrogatories. The jury was asked whether any of the following constituted fraud in connection with the 4,000 share purchase: (a) an alleged misrepresentation by Simons that River Oaks needed Lawrence Ansin's guarantee in order to maintain its financing; (b) an alleged misrepresentation by Keenum that Lawrence Ansin's R O Realty shares had no value independent of River Oaks; (c) the offer communicated by Keenum to purchase the Ansin shares for $300,000 and the release of Lawrence Ansin's guarantee; and (d) the alleged failure to disclose that River Oaks was discussing a public offering with Bradford. The jury returned a verdict favorable to plaintiffs **only on (d)**, and awarded plaintiffs damages of $1,082,400 for securities and common law fraud against all defendants. This was exactly equal to the difference between the value of the 4,000 shares (after a stock split) **based on the $12 per share IPO price, and the $300,000 purchase price paid the Ansins.** (Appendix A, p. 22a). The jury also found that River Oaks committed breach of contract in the 1989 reduction of the Ansin interest by 3,500 shares. The jury awarded damages of $1,209,600 for breach of contract against River Oaks. This was exactly equal to the value of such shares (after a stock split) **based on the $12 per share**

IPO offering price. (Appendix A, p. 25a.) The jury also awarded plaintiffs compensatory damages of $16,440 for breach of fiduciary duty, and awarded punitive damages against both Simons and Keenum.

Defendants appealed the judgment to the United States Court of Appeals for the First Circuit, which affirmed the judgment in all respects. The Court of Appeals held that the District Court's instructions on damages under Section 10(b) of the Securities Exchange Act and Rule 10b-5 was not erroneous in failing to state when the Ansin interest must be valued, and that the jury could properly value the shares sold by plaintiffs on the basis of the public offering price ten months later. (Appendix A, pp. 22a-25a.) The Court of Appeals refused to consider whether the jury instruction for damages for breach of contract was erroneous, on the grounds that this issue was not preserved for appeal. (Appendix A, p. 25a) The Court of Appeals apparently overlooked the fact that the District Court had expressly told the jury that it should use the same measure of damages for both securities and common law fraud and breach of contract (Appendix F, p. 46a)[2], and defendants counsel's objection was not limited to the damages instruction on the securities fraud claim. (Appendix F, pp. 50a-51a.) The Court of Appeals also failed to address the absence of any evidence about Lawrence Ansin's own knowledge, information and expectations relative

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[2] "The value that you assign to these 3,500 shares [for breach of contract] should be consistent with the value of the loss, if any, that you find the Ansins incurred on the sale of the 4,000 remaining shares in November of 1992 ... measured by what the Ansins should or would have received but for defendants' fraudulent conduct, less, of course, the value of what they did, in fact, receive." (Appendix F, p. 46a.)

to a public offering, and that various elements of plaintiffs' fraud claim were therefore dependent upon speculation.

REASONS FOR GRANTING THE WRIT

A. The Opinion of the Court of Appeals Not Only Presents an Important Question of Federal Law That Has Not Been, But Should Be, Addressed by the Court, But Also Decides That Question In a Way Which Conflicts With the Relevant Decisions of This Court.

1. This Case Presents an Important Question of Federal Law That Has Not Been, But Should Be, Addressed by This Court.

In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972), this Court held that the correct measure of "out of pocket" damages recoverable by a seller of securities in an action under Section 10(b) and Rule 10b-5, as limited by Section 28 of the Securities Exchange Act of 1934, is as follows:

> In our view, the correct measure of damages under §28 of the Act, 15 U.S.C. §78bb(a), is the difference between the fair value of all that the . . . seller received and the fair value of what he would have received had there been no fraudulent conduct, see *Myzel v. Fields,* 386 F.2d 718, 748 (CA8 1967), *cert. denied,* 390 U.S. 951 (1968), except for the situation where the defendant received more than the seller's actual loss. In the latter case damages are the amount of the defendant's profit.

> See *Janigan v. Taylor,* 344 F.2d 781, 786 (CA1 1965), *cert. denied,* 382 U.S. 879 (1965).

As observed in 5D Jacobs, Arnold S., *Litigation and Practice Under Rule 10b-5* §260.03[c][ii]:

> The high Court's wording of this measure leaves open two key points: ... (2) As of what time is fair value determined?

As Jacobs points out, most authorities agree that fair value must be determined as of the date of the offending transaction. Jacobs, §260.03[c][ii], and cases cited at note 12; see also cases cited *infra* in the next section of this Petition. Until its decision in this case, the rule that out-of-pocket damages are measured as of the date of the offending transaction was followed in the First Circuit Court of Appeals whose opinion in *Janigan, supra,* was cited by this Court with approval in *Affiliated Ute* setting forth the proper measure of damages. As stated in *Janigan*, unless the defendant has profited on a resale of the securities purchased from the plaintiff, damages must be measured by

> the difference between the real value of the property at the date of its sale ... and the price paid for it ... but not damages covering 'the expected fruits of an unrealized speculation.'

344 F.2d at 786 (emphasis supplied), citing this Court's opinion in *Sigafus v. Porter,* 179 U.S. 116 (1900). *Sigafus* was an action for deceit, and this Court has not explicitly stated when such valuation must occur for purposes of an action subject to Section 28 of the Securities Exchange Act.

2. The Court of Appeals' Decision Conflicts With *Affiliated Ute Citizens*.

The District Judge in this case instructed the jury that damages should be

> the difference between what the Ansins actually received for their stock and what you believe they would have received had they refused to sell or, instead, insisted on different terms.

(Appendix F, p. 48a.) Defendants' counsel objected to this instruction as leaving open for speculation the time at which damages should be calculated, and as suggesting to the jury that plaintiffs might recover damages on the basis of the IPO some ten months after plaintiffs' sale. (Appendix F, p. 50a-51a.) The District Judge refused to clarify the instruction, and the jury did in fact make its award of damages based upon the IPO price, even though River Oaks had, ten months before the IPO, resold the Ansin shares, at the same price paid to the Ansins, to others who did not sell shares in the IPO, only one of whom, Thomas Keenum, was a defendant in this case. It is important to note that the jury acquitted the defendant Keenum of fraud in connection with proposing the $300,000 price at which the Ansins sold their shares to River Oaks. It thus appears that the jury concluded that this was a fair price for the shares as of the date of the offending transaction.

In addressing the sufficiency of the District Court's instruction, the Court of Appeals quoted the *Affiliated Ute* measure of out-of-pocket damages. However, the Court of Appeals made no further reference to this measure, but observed as follows:

> The definition of "actual damages," however, has been left to the courts. This question presents difficulties, which are greatest in cases involving closely held securities that have no readily ascertainable market value.

(Appendix A, p. 23a.)[3] The Court of Appeals rejected petitioners' argument that the Ansin shares should have been valued as of the date of the fraudulent transaction, and approved a valuation on the basis of the public offering price ten months later. The Court of Appeals reasoned as follows:

> Here, the very nature of the fraud was to induce the plaintiffs to sell their stock at a time before the stock **would appreciate in value** due to the contemplated IPO and stock split. To adopt defendants' argument that damages cannot exceed the price [sic][4]of the shares at the time of the sale would be to reward and encourage such chicanery. Defendants' attempt to limit plaintiffs' recovery to a hypothetical market price as of November 1992 is unavailing. The trier of fact was entitled to infer that a reasonable investor, fully informed of the IPO discussions, including the conditions set by J.C. Bradford [for an IPO], **would not have sold his**

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[3] The shares in *Affiliated Ute* had no readily ascertainable market value at the time of the fraudulent transaction.

[4] Defendants never argued that the damages could not exceed the price of the shares paid to plaintiffs, but only that the price paid to River Oaks, a "knowledgeable seller," as approved by the individual defendants and paid by shareholders other than the individual defendants, established that the actual value of the shares at that time was no more than what the Ansins received.

> **stock in November 1992 for less than his proportionate share of the IPO proceeds.**

(Appendix A, pp. 23a-24a; emphasis supplied.)

The Court of Appeals and the District Court both apparently interpreted the words "fair value of what [plaintiff] would have received had their been no fraud," as used by this Court in *Affiliated Ute,* to mean fair value of what the Ansins would have received had their been **no transaction at all**. The jury instruction, as given, would require the jury to speculate as to whether, when, and at what price a plaintiff might have sold his shares, had he not sold them to defendants instead. It would thus permit a plaintiff to recover a loss which he might never have suffered, and would therefore be speculative. This conflicts with the holding in *Affiliated Ute* and the plain command of Section 28 of the Exchange Act, 15 U.S.C. §78bb(a)[5], that a plaintiff only recover actual damages.

In spite of the fact that the First Circuit's opinion in *Janigan v. Taylor* has authoritatively influenced both this Court and the courts of most other federal circuits, the opinion in the case at bar fails even to mention *Janigan,* except in footnote 9 (Appendix A, p. 24a.) In that footnote, the opinion reasons that the opinion is consistent with *Janigan* (and, presumably, with *Affiliated Ute*), because persons **other than defendants** "reaped the profits of

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[5] The jury was not instructed on rescissory damages, but rescissory damages would have been substantially less than the damages awarded. By the trial date, the market value of the Ansin shares was only a fraction of the IPO price. This Court has not yet determined whether rescissory damages are available in an action brought under Section 10(b) and Rule 10b-5. *Randall v. Loftsgaarden,* 478 U.S. 647, 661 (1986).

defendants' fraud." There were no allegations, evidence, court findings, or special jury verdicts that anyone profited from the fraud of which the jury found defendants guilty. And to the degree that anyone could have reaped profits, they could only have done so at the expense of River Oaks, defendant Simons, and those other River Oaks shareholders who received no Ansin shares, and whose interest in River Oaks was proportionately reduced by River Oaks' resale of the Ansin shares.

This Court should thus grant certiorari because the opinion of the Court of Appeals endorses a measure of damages which is radically different from, and contrary to, the correct measure of damages as established under *Affiliated Ute's* construction of Section 28 of the Securities Exchange Act of 1934.

B. <u>The Opinion Below Conflicts With Those of a Number of Other United States Courts of Appeal on This Important Issue</u>.

The Court of Appeals' holding, which permits valuation as of a date long after the date of the offending transaction when there has been no profit or resale by the defendant, is contrary to the opinions of those other Circuits which have considered the issue. *See, e.g., Siebel v. Scott,* 725 F.2d 995, 1001, 1002 (5th Cir.), *cert. denied,* 467 U.S. 1242 (1984) (citing *Janigan* and *Affiliated Ute* as providing damages rule applicable to defrauded seller, who is entitled to recover on basis of "value of interests at the moment of sale or the profit realized by [defendant] through the resale"); *Austin v. Loftsgaarden,* 675 F.2d 168, 180 (8th Cir. 1982), *cert. granted,* 474 U.S. 978 (1985), *rev'd and remanded,* 478 U.S. 647 (1986) (out-of-pocket measure is "difference between the purchase price of the security and its

actual value on the date of purchase"); *Nickels v. Koehler Management Corp.*, 541 F.2d 611, 617-18 (6th Cir 1976), *cert. denied*, 429 U.S. 1074 (1977) (citing *Affiliated Ute*, *Sigafus* and *Janigan* as measure of damages recoverable by a defrauded seller for the "value of the property at the date of its sale" unless purchaser profits on resale); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1344-45 (9th Cir. 1976) (concurring opinion, proper measure is "difference between purchase price and the value of the stock at the date of purchase"); *Levine v. Seilon, Inc.*, 439 F.2d 328, 334 (2d Cir. 1971) (relying upon *Janigan* as providing damages rule applicable to defrauded seller and requiring valuation as of date of transaction unless defendant unjustly enriched on resale); *Estate Counseling Serv., Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527, 533 (10th Cir. 1962) (proper measure for defrauded seller is "the difference between the contract price, or the price paid, and the real or actual value at the date of sale"). Those opinions which have permitted subsequent events to be considered in valuing the shares sold by a defrauded plaintiff have consistently followed the rule of *Janigan* (adopted by this Court in *Affiliated Ute*) that such consideration is permissible only where the defendant has profited on a resale of the securities. *See, e.g., Siebel v. Scott, supra,* 725 F.2d at 1002 (remanding case for determination of value at time of transaction and amount of defendant's profit); *Myzel v. Fields, supra,* 386 F.2d at 787 (where defendants profited in manner indistinguishable from defendant's profit in *Janigan,* consideration of future accretions is permissible). The First Circuit's adoption of a rule permitting such consideration where the defendants have made no such profit represents a clear repudiation of *Janigan* and gives rise to a serious and irreconcilable conflict with *Janigan's* progeny in these other Circuits.

The opinion's reliance upon *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 440 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) (see Appendix A, p. 24a) is puzzling because, on this issue, *Jordan* is not only plainly distinguishable, but is irreconcilable with the opinion below. In *Jordan*, a former shareholder/employee of a closely held corporation filed suit against the corporation alleging that the corporation had failed to disclose information concerning a possible acquisition of the company when the plaintiff left his employment. The plaintiff sold his shares in the company back to the company, and surrendered his right to purchase additional shares. Before he could cash the check for the sale of his shares, he learned that the company was to be acquired by a publicly held company on favorable terms. The plaintiff tendered back the check and filed suit seeking either rescission or damages equal to the value which his shares would have had under the terms of the favorable acquisition. In an *en banc* opinion reversing summary judgment in favor of the company, the majority opinion discussed the issue of recoverable damages at great length. The majority concluded that either a "rescissory" or "market" (out-of-pocket) measure of damages must be used; and that the market measure of damages requires valuation as of the date of the transaction, citing *Affiliated Ute*:

> If the investor sells for $200 a security that on the day of sale would fetch $1,000 in an arms' length transaction between fully informed parties, he recovers his loss of $800.

815 F.2d at 442 (emphasis supplied). Perhaps even more importantly, *Jordan* observes that whatever the employee might have received had he retained his shares and participated in the merger must be discounted by the probability, **as of the date of sale**, that the merger would

not be accomplished. 815 F.2d at 442-43. This is, of course, entirely inconsistent with the holding by the First Circuit in the case at bar, which would permit plaintiffs to recover 100% of what they would have received, assuming they had held their shares and sold them in the IPO which might never have occurred and did not in fact occur until ten months after their sale to River Oaks.

This Court should therefore grant certiorari in order to resolve a clear conflict between the new rule adopted by the First Circuit, as announced in its opinion in this case, and the rule prevailing in the other federal circuits with which it conflicts.

C. The Opinion Sanctions an Abrupt and Extremely Serious Departure by the District Court From the Usual Course of Judicial Proceedings, in That the Jury Was Left to Speculate as to Damages and Other Elements of Plaintiffs' Claim, and the Verdicts Could Only Have Been the Product of Rank Speculation.

The principal that a verdict may not be premised upon speculation is so familiar and well-established that, in another case, it might be superfluous to cite authority for the proposition. This Court has recognized the principal on innumerable occasions. As stated in *Moore v. Chesapeake & O.R. Co.*, 340 U.S. 573, 578 (1951),

> Speculation cannot supply the place of proof.

In the opinion in the case at bar, however, the Court of Appeals affirmed a verdict which was based entirely on speculation not only with respect to damages, but also with respect to basic elements of plaintiffs' claims.

1. Speculation as to Damages.

The Court of Appeals' endorsement of the District Court's failure to instruct the jury as to when damages must be assessed approves an abdication of judicial responsibility to provide a proper, nonspeculative measure of damages. In the absence of any instruction as to when the plaintiffs' damages must be calculated, the jury was left without guidance to award damages based upon a wide range of values fluctuating over an indeterminate period. The jury had to speculate as to whether, when, and at what price plaintiffs would have sold their shares had they not sold them to defendants. At the time of the offending transaction, neither defendants nor anyone else knew (a) whether the contemplated IPO would in fact be successful; (b) the price at which the shares might eventually be offered to the public; (c) the date at which the existing shareholders might be able to sell their shares; or (d) the market price on the date of such a sale. In this case, the jury apparently concluded that had the plaintiffs not sold their shares in the offending transaction, plaintiffs would have sold them in the IPO--something which neither the individual defendants nor any other River Oaks shareholder accomplished.

As already pointed out, the opinion below conflicts with the majority opinion of the Tenth Circuit in *Jordan v. Duff & Phelps, Inc.* on which it relies on the question of when shares must be valued for purposes of awarding out of pocket damages. However, both *Jordan* and the case at bar endorse jury speculation in awarding damages under Section 28(a). *Jordan* does so explicitly, albeit in dicta. The majority in *Jordan* noted the difficulty of determining whether there was any connection between the

alleged fraud and any loss suffered by the plaintiff, and suggested as follows:

> It may be necessary simply to ask the jury whether Jordan [the plaintiff] would or would not have stayed through the end of 1985 [and so retained his stock and participated in the fruits of the merger], speculative as the answer may be.

815 F.2d at 443 (emphasis supplied). The opinion in the case at bar apparently took this remarkable observation to heart.[6] The First Circuit's opinion in the case at bar implicitly endorses speculation far beyond even that suggested in *Jordan*. In *Jordan,* all persons who were shareholders at the time of the merger sold their shares in the merger so that, had the plaintiff retained his shares at the time of merger, speculation would not be required as to whether he would have sold at the merger price. In this case, on the other hand, plaintiffs might yet own the shares had they not sold them to River Oaks. The opinion in the case at bar thus reflects enormous confusion as to the respective roles of court and jury in an action under 10b-5, and the role of speculation in awarding damages. This Court should exercise its supervisory authority in order to ensure that the Congressional mandate of Section 28 of the Securities Exchange Act is applied consistently, and without speculation.

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[6] Counsel for petitioners is not aware of any case other than *Jordan v. Duff and Phelps, Inc.* which explicitly endorses jury speculation as to recoverable damages in an action under Section 10(b) and Rule 10b-5. In *Affiliated Ute*, this Court rejected as "unreasonable and speculative" the petitioners' proposed damages calculation in that case. 406 U.S. at 155.

2. Speculation as to Other Elements of Plaintiffs' Claims.

a. Securities and Common Law Fraud.

The only fraudulent misstatement or omission of which the jury found defendants guilty was a failure to disclose the fact that River Oaks was consulting an investment banker, J.C. Bradford, about a possible IPO. The uncontradicted testimony of defendant Simons was that he told Lawrence Ansin, in approximately April of 1992, that River Oaks was consulting an investment banker about the possibility of an IPO.

It may be that the jury chose to disbelieve Simons' testimony that he told Lawrence Ansin that River Oaks was consulting an investment banker, but this is not sufficient.

> True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of [a witness's] testimony would not supply a want of proof. Bunt v. Sierra Butte Gold Mng. Co., 138 U.S. 483, 585. Nor would the possibility alone that the jury might disbelieve [the witness's] version make the case submissible to it.

Moore v. Chesapeake & O.R. Co., supra, 340 U.S. at 576. *See also, Janigan, supra,* 344 F.2d at 784. The Court of Appeals in the case at bar cited other evidence (some of which was contradicted by the jury's special verdicts), as supporting other possible inferences of fraud, but none to support an inference that Simons did not tell Ansin that River Oaks was consulting an investment banker, the only fraud of which the jury found defendants guilty. And

certainly in the absence of any evidence as to Lawrence Ansin's other information, knowledge and expectations as a founder of River Oaks, the jury could only speculate as to the materiality of any information which was not disclosed. That is, they could only speculate as to whether there was

> a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the "total mix" of information available

to Lawrence Ansin. *Basic, Inc. v. Levinson,* 485 U.S. 224 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, *motion dismissed,* 429 U.S. 810 (1976)).

For that matter, in the absence of any testimony from Lawrence Ansin, no other element of plaintiffs' fraud claim could be established without rank speculation. Lawrence Ansin, a founder of River Oaks, participated in the decision to sell the Ansin shares. It is undisputed that the founders had always planned to take River Oaks public. (Appendix A, p. 7a.) As recognized by the Court of Appeals, there were no ongoing discussions with Bradford at the time of the purchase from the Ansins. (Appendix A, pp. 7a, 9a.) In the absence of any evidence concerning Lawrence's knowledge, information, and state of mind, there was thus a total absence of any evidence concerning (a) when Lawrence Ansin, a founder of River Oaks, may have anticipated that River Oaks would conduct a public offering; (b) the total mix of information available to Lawrence Ansin as to whether, when, and at what price an IPO might be conducted; (c) the effect which Simons' disclosure (or lack thereof) may have had on that expectation; (d) what difference it might have made to Lawrence Ansin's expectations that Bradford did not

think River Oaks was ready to conduct a public offering; (e) whether, given what he already knew, the information conveyed to him was misleading in the absence of some additional disclosure; and (f) that the information not disclosed would have changed his mind about selling the Ansin shares in order to be relieved of his personal guarantees in light of his illness.

b. Breach of Contract.

As to the breach of contract claim, Simons' testimony was uncontradicted that he and Lawrence Ansin agreed to the reduction in the Ansin interest. While the Court of Appeals stated that his testimony was "uncorroborated," the Ansins' own conduct unambiguously corroborated that there was such an agreement. The Ansins received, without complaint, a stock certificate for the reduced number of shares. Harold Ansin paid taxes on the basis of the reduced percentage interest (4%). The Ansins negotiated for a purchase price with River Oaks on the basis of owning only a four percent (4%) interest. The Ansins executed stock powers transferring 4,000 shares to River Oaks. Thus, there was an abundance of confirmation of Simons' uncontradicted testimony, and the only possible basis for the award was disbelief of that testimony. As already discussed, disbelief of testimony cannot supply a want of proof. *Moore v. Chesapeake & O.R. Co., supra,* 340 U.S. 576.

CONCLUSION

In summary, this case presents an extremely important issue of federal law as to the time for valuation of securities for purposes of awarding out-of-pocket damages under Section 28 of the Securities Exchange Act. The Court of Appeals' opinion conflicts with *Affiliated Ute* and the prevailing rule in those other federal circuits which have addressed the issue. That conflict apparently results from confusion which would be resolved were this Court to address the issue of when securities must be valued under the test announced in *Affiliated Ute*. Further, this Court should grant certiorari in order to exercise its supervisory authority because the opinion of the District Court, approved by the Court of Appeals, constituted an abdication of judicial responsibility to properly instruct the jury in such a way as to prevent speculation, and endorsement of the jury speculation which resulted. Further, the opinion relies upon dicta of another Circuit Court of Appeals, the Tenth Circuit, which explicitly endorsed jury speculation on the issue of damages recoverable under Section 28 of the Securities Exchange Act. *Jordan, supra.*

For all of the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 96-1734 and 96-1735

HAROLD S. ANSIN, ET AL.,
Plaintiffs, Appellees,

v.

RIVER OAKS FURNITURE, INC., ET AL.,
Defendants, Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**
[Hon Richard G. Stearns, *U.S. District Judge*]

Before
Cyr, Boudin, and Lynch,
Circuit Judges.

Edward P. Leibensberger, with whom *John C. Fitzpatrick, Glenn E. Deegan,* and *Nutter, McClennen & Fish, LLP* were on brief, for appellees.

Ames Davis, with whom *Nancy S. Jones* and *Waller Lansden Dortch & Davis* were on brief, for appellants.

February 3, 1997

LYNCH, *Circuit Judge*. This case arises from a series of transactions among former fellow shareholders of a Mississippi close corporation, River Oaks Furniture, Inc. The Ansins,[1] Massachusetts investors, allege that Thomas Keenum and Stephen Simons, officers and directors of River Oaks, fraudulently induced them to sell their shares in River Oaks ten months before a successful initial public offering ("IPO"). The Ansins also allege that Keenum and Simons violated the contractual terms of a stock subscription agreement and other corporate documents by causing an unauthorized transfer of a number of the Ansins' shares to other corporate insiders. The Ansins sued Keenum, Simons and River Oaks Furniture in federal court in Massachusetts, alleging securities law violations under Section 10(b) of the Securities Exchange Act of 1934, conversion, breach of contract, breach of fiduciary duty, common law fraud, legal malpractice and a violation of Mass. Gen. Laws ch. 93A.

The jury found for the plaintiffs on all counts then remaining in the case and awarded both compensatory and punitive damages. Defendants appeal from the judgment against them, arguing that they were entitled to judgment as a matter of law on all counts, that the action was barred because of laches and related doctrines, and that both the compensatory and punitive damages awards are legally unsustainable. The Ansins cross-appeal the pre-trial dismissal of their Mass. Gen. Laws ch. 93A claim, and also argue that the district judge improperly denied their request for prejudgment interest. They also ask this court to correct a clerical error in the judgment.

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[1] The plaintiffs in this action are Harold S. Ansin, Lawrence J. Ansin (by the executor of his estate), and the Ansin Foundation (a private charitable trust), collectively "the Ansins."

I.

When the losing party challenges the sufficiency of the evidence, as defendants do here, this court views the record in the light most favorable to the jury's verdict. *See Correa v. Hospital San Francisco,* 69 F.3d 1184, 1188 (1st Cir.), *cert. denied,* 116 S. Ct. 1423 (1995). The facts are described as the jury might have found them, drawing reasonable inferences in favor of the plaintiffs.

A. The Ansin Investment in River Oaks

Lawrence (Larry) Ansin, a Massachusetts fabric manufacturer, met Stephen Simons, then a furniture buyer with a Texas retailer, in the mid-1970s. What began as a business relationship grew, over the next decade, into a friendship. The two men vacationed together and visited each other's homes.

In 1987, Simons started his own upholstered furniture company in Mississippi. The company had six original investors in addition to Simons; five of these men, including Thomas Keenum, had been involved with the start-up and eventual IPO of another Mississippi upholstery manufacturer. The sixth investor was Larry Ansin, who was, at that time, the chief executive officer and sole shareholder of Joan Fabrics, a Massachusetts-based company.

River Oaks Furniture, Inc. was incorporated in August 1987. Larry Ansin's total investment in the venture was $100,000, for which he was issued a certificate, dated September 1, 1987, for 7,500 shares of common stock. That was 10% of the then-issued shares. Simons owned 30,000 shares and was president of the company; Keenum owned 7,500 shares and was secretary and treasurer. Keenum and Simons were two of the three members of the Board of Directors.

In March 1988, the River Oaks investors set up another Mississippi corporation, R-O Realty, Inc., to own real estate which would then be leased to River Oaks. Each of the original investors contributed another $500 in capital and Larry Ansin was issued a share certificate for 437.5 shares in R-O Realty.

In 1988, Larry Ansin decided to sell Joan Fabrics. Larry Ansin expected that, as part of such a transaction, he would have to sign a non-competition agreement, which would preclude him from owning stock in another furniture company. Accordingly, Larry Ansin arranged to sell his River Oaks shares to his father, Harold Ansin, for the $100,000 he had originally invested. The Ansins executed a Stock Purchase Agreement dated May 31, 1988. Harold Ansin did not know how many shares he was purchasing, but understood that he was buying his son's entire 10% interest in River Oaks.

In April 1992, Larry Ansin learned that he had an inoperable brain tumor. He died on June 24, 1993, before the commencement of this litigation.

B. The Reduction of the Ansin Interest to 4,000 Shares

Harold Ansin did not sell any of the River Oaks shares until 1992. Nonetheless, at some point in 1989, the Ansin ownership interest was reduced from 7,500 to 4,000 shares, or from 10% to 4% of the company.[2] The company issued 25,000 new shares in 1989, but that legitimate dilution would only have reduced the Ansin stake to 7.5%.

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[2] The River Oaks 1988 tax return lists Harold Ansin as owning 7,500 shares. Harold Ansin's River Oaks 1988 K-1, a tax form issued to shareholders by the corporation, states that Ansin owned 10% of the company. Ansin's 1989 K-1, however, indicated that Ansin now owned only 4% of the company.

Following Harold Ansin's purchase of his son's shares, River Oaks did not issue a new stock certificate in Harold Ansin's name. Harold Ansin was upset about this and kept asking Larry to do something about it. Larry Ansin wrote to Simons twice in 1989 requesting a new share certificate for Harold. Eventually, a certificate was issued on September 22, 1989 which indicated that, as of January 1, 1988, Harold Ansin owned 4,000 shares of River Oaks.

The Stock Transfer Ledger of River Oaks Furniture, which was not actually typed up (from Keenum's notes) until 1993, shows Lawrence Ansin as originally owning 7,500 shares. However, according to the Ledger, Ansin transferred only 4,000 shares to his father on January 1, 1988, and then transferred 1,000 shares to Simons and 2,500 shares to Donald Franks, another of the original River Oaks investors, on January 1, 1989.

Simons testified that these transfers of stock by Larry Ansin were part of a general reallocation of shares undertaken in early 1989. According to Simons, during a telephone conversation in February or March 1989, he told Larry Ansin that, in order to recruit talented new employees, the company wished to issue 25,000 new shares of stock. Simons further testified that Larry Ansin then orally agreed to reduce his ownership interest to 4%. However, Simons acknowledged that there is no record of this conversation nor any contemporaneous records or correspondence memorializing the transfers to Simons and Franks. Simons also testified that he and Ansin only discussed percentages of ownership, as opposed to numbers of shares, and that Ansin did not receive any money for the transfers. Simons did not speak to Harold Ansin about the transfers.

Thomas Keenum, who, as company secretary, was responsible for maintaining the Stock Transfer Ledger, testified that no document, other than his personal notes, records

these stock transactions, and that only Simons, and not the Ansins, ever communicated with him about the decrease in the Ansin ownership interest. Although other capital transactions are recorded in the minutes of the Board of Directors, the Ansin transfers were not, nor to Keenum's knowledge, were there any signed agreements, letters, or memoranda noting these transfers.

The foundation documents of River Oaks included Articles of Incorporation, By-Laws, and a Subscription Agreement among the stockholders. These documents regulated, among other things, the transfer of shares in the company. Paragraph 12 of the Articles of Incorporation provided that:

> before a transfer [of stock] may be made, [the] owner or holder shall notify the secretary/treasurer of this corporation in writing of the number of shares to be transferred, the certificate involved [and other pertinent information].

The Subscription Agreement, which was "binding upon and shall inure to the benefit of each individual Stockholder and his respective heirs, executors, administrators, assigns and legal representatives," recited that "[e]ach Stockholder agrees that all shares of Stock of the Company . . . shall be subject to the terms and conditions of Paragraph Number 12 of the Articles of Incorporation." The By-Laws, which charged the secretary with maintaining the stock transfer books of the corporation, stated that:

> Transfer of shares of the corporation shall be made only on the stock transfer books of the corporation by the holder of record thereof or by his legal representative . . . .

At trial, the plaintiffs argued that these documents constituted an enforceable contract, and that defendants'

unauthorized transfer of 3,500 River Oaks shares to Simons and Franks amounted to a breach of that contract.

C. The Repurchase of the Ansin Interest and the IPO

The original investors in River Oaks had hoped, from the beginning, eventually to take the company public. During the first quarter of 1992, the company took the first step of talking to an investment banker about a public offering. Breck Walker, a managing director of J.C. Bradford & Co., a Nashville investment bank, visited River Oaks several times during the first half of 1992, to evaluate the company's prospects as an IPO candidate.

These contacts culminated in an April 23, 1992 meeting in Nashville between the River Oaks management, including Keenum and Simons, and the J.C. Bradford commitment committee.[3] At the meeting, River Oaks' value was discussed and, according to the notes of a J.C. Bradford analyst, Keenum stated that a value of $25 million was "about right." Analyses prepared by J.C. Bradford for internal use projected a range of values from $16.3 million to $31 million, depending on the assumptions used, and similar valuations were discussed with River Oaks personnel.

Shortly thereafter, J.C. Bradford determined that, given all the circumstances, including market conditions, River Oaks was not a candidate for an IPO in 1992. J.C. Bradford advised River Oaks to wait until the end of 1992 or early 1993 to see if the company met its projections before proceeding further.

At approximately the same time, April 1992, Larry Ansin learned that he had a brain tumor. After his diagnosis, Ansin

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[3] The commitment committee is a group of top-level executives at J.C. Bradford who must approve all IPO transactions.

asked Patrick Maraghy, his tax planner, to act as an intermediary in his financial dealings. Ansin continued to make his own decisions.

In July 1992, Walter Billingsley, the River Oaks controller, and Simons contacted Maraghy about refinancing River Oaks' debt. Ansin, like the other original shareholders, had previously signed personal guarantees for bank loans to River Oaks; now, the Bank of Mississippi wanted another personal guarantee from Ansin for $550,000 of new financing. Maraghy communicated the request to Ansin, who declined to provide new guarantees because he was very ill and because he was no longer a shareholder of River Oaks.

Through August and into September of 1992, Simons continued to call Maraghy frequently, pressuring him to get Larry Ansin to reconsider his decision. At no time did Simons tell Maraghy that the bank had agreed, on August 5, 1992, to proceed with the refinancing without a new guarantee from Larry Ansin. Instead, Simons represented that the company would have problems without the new Ansin guarantee, and that people would be thrown out of work. In early September, Simons asked if Harold Ansin would sign a personal guarantee, but Harold Ansin declined.

In mid- to late-September, Simons called Maraghy and asked if the Ansins would be willing to sell their stock back to River Oaks so that someone else could purchase it and provide the guarantee. The Ansins agreed, believing that the sale would help Simons obtain the needed financing.

On October 19, 1992, Keenum called Maraghy to discuss an offer of $300,000 for the Ansin River Oaks Furniture and R-O Realty shares. Keenum told Maraghy that River Oaks had recently bought out Keith Franklin, the only other non-management shareholder, for $60,000 per 1% interest, indicating that $300,000 was a fair price for the Ansin's 4% interest in River Oaks. Keenum also told Maraghy that the

R-O Realty shares were valueless, as R-O Realty's properties were heavily encumbered with debt.

The Ansins agreed to the sale, believing that the price was fair and that they were accommodating Simons' need for bank financing. Simons wrote to Maraghy, thanking him "for helping me resolve this problem."[4] The sale of the Ansin shares for $300,000 was closed in November 1992.

In board meetings on November 19, 1992, and December 1, 1992, the directors of River Oaks authorized the resale of the Ansin River Oaks shares, for the same price River Oaks had paid, to Keenum, Billinglsey, and other original River Oaks investors. The Board had already authorized the resale of the Ansin R-O Realty shares to Keenum, Simons and other insiders on September 1, 1992, even though the repurchase offer had not yet been made. Everyone purchasing Ansin shares was familiar with the IPO discussions with J.C. Bradford.

Keenum and Simons acknowledge that, during the repurchase discussions, they never told Maraghy about the meetings with J.C. Bradford or about the prospect of restarting IPO discussions in early 1993. Although there were no ongoing negotiations in November 1992, Billingsley testified that River Oaks' management knew by October or November 1992 that the company would meet its sales projections for 1992 and so would meet the condition set by J.C. Bradford for following up on the IPO. During a conference call on December 7, 1992, less than two weeks after the Ansin repurchase, Ron Ashby, River Oaks' outside auditor, discussed the impact of an IPO on River Oaks' accounting for employee loans with Keenum and other River Oaks personnel. Ashby's notes, made in the month or two prior to that

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[4] Before finalizing the sale, Harold Ansin transferred the shares to the Ansin Foundation, a family charitable trust, for tax reasons.

call, indicate that River Oaks was looking at an IPO in July or August 1993.

Simons testified that, in one phone conversation in early 1992, he told Larry Ansin that River Oaks had made initial contact with an unspecified investment banker, and that Larry Ansin thought going public was a great idea. However, Harold Ansin, Maraghy, and Susan Ansin, Larry's wife, all testified that Larry Ansin never mentioned the possibility of an IPO, even though they all stated that Larry discussed business with them regularly.

The River Oaks board approved an IPO on March 1, 1993. Maraghy first learned that an IPO was being planned from a June 1993 newspaper article. By this time, Larry Ansin had died.

River Oaks went public on August 26, 1993 for $12 per share. As part of the transaction, River Oaks effected a 28.8 for 1 stock split on June 23, 1993. This meant that the Ausins' 7,500 shares would have become 216,000 shares. Additionally, R-O Realty was merged into River Oaks furniture, and the R-O Realty shareholders received $1.2 million of River Oaks stock. From the proceeds of the offering, River Oaks distributed $2,465,000 of previous earnings to its pre-IPO shareholders.

Finally the plaintiffs learned from the prospectus of the existence of River Wood Products, Inc. River Wood had been established in 1991 to produce furniture frames for River Oaks. Although there were no significant financial benefits to setting up River Wood as a separate corporation, a 1991 memo from Ashby indicated that "a political reason for setting up . . . separate corporations would be to exclude certain current River Oaks shareholders." Harold Ansin was one of the shareholders excluded. At the time of the IPO, River Wood shareholders received shares of River Oaks Furniture stock.

At trial, plaintiffs' expert testified that if the Ansins had held 7,500 shares prior to the IPO and then sold them at the end of the restricted period, they would have received a total of $4,179,140. This figure included proportional allocations of River Oaks Furniture shares for the Ansin R-O Realty shares and for a hypothetical 7.5% interest in River Wood Products. It also included a share of the S-corporation distribution.

II.

The Ansins filed suit on October 4, 1993, alleging securities law violations, fraud, breach of fiduciary duty, malpractice and Mass. Gen. L. ch. 93A claims arising from defendants' failure to disclose the planned IPO. After discovery, on June 17, 1994, plaintiffs filed a Second Amended Complaint, adding a conversion claim for the reduction of the Ansin interest to 4,000 shares. The district court granted a defense motion to dismiss the ch. 93A and malpractice claims on October 12, 1994. On July 5, 1995, a Third Amended Complaint was filed, which included a breach of contract claim arising from the same facts as the conversion claim.

On November 15, 1995, the district court granted defendant's motion for summary judgment on the conversion claim, finding that the Massachusetts three-year statute of limitations for torts barred any conversion claim that the Ansins should have discovered prior to October 4, 1990. The district court found that various 1989 tax documents, signed by Harold Ansin and indicating that he owned a 4,000 share or 4% interest in River Oaks, should have alerted Ansin to the alleged conversion.

The remaining claims were tried to a jury. The jury returned a special verdict form finding that: 1) defendants violated the Securities Exchange Act and engaged in

common law fraud by failing to disclose the public offering discussions with J.C. Bradford; 2) River Oaks committed a breach of contract when the Ansin interest was reduced to 4,000 shares; 3) Simons and/or Keenum breached the fiduciary duty owed by a dominant shareholder to a minority shareholder by failing to disclose the discussions with J.C. Bradford and by failing to offer the Ansins the opportunity to participate in River Wood Products, Inc. The jury awarded compensatory damages of $1,082,400 against all defendants for the fraud claims, $1,209,600 against River Oaks for the breach of contract, and $16,400 against Simons and Keenum for the breach of fiduciary duty. It also awarded punitive damages under Mississippi law of $25,000 against Simons and of $100,000 against Keenum.

The defendants moved for judgment as a matter of law at the close of plaintiffs' case, after the verdict, and following the entry of judgment. On April 26, 1996, defendants moved, pursuant to Rule 49(a), Fed. R. Civ. P., to have the court address issues not submitted to the jury. The district court denied these motions.

III.

Defendants make numerous arguments with regard to each count of the verdict and the damages awarded. We examine these contentions in turn.[5]

A. The Federal Securities and Common Law Fraud Claims

The federal securities claim alleged violations of § 10(b) of the Securities Exchange Act and Rule 10b-5. Defendants argue that the district court erred in denying their motion for a judgment as a matter of law on the federal securities law

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[5] Except as otherwise noted, the parties agree that Mississippi law is the relevant substantive law on the state law claims, and that Massachusetts provides the relevant procedural provisions.

and Mississippi common law fraud claims. Specifically, defendants assert that there was no evidence of omission or misrepresentation, of fraudulent intent, of materiality or of reliance.

Review of the district court's denial of a motion for judgment as a matter of law is plenary. *See Correa,* 69 F.3d at 1191. As did the district judge, we review the record in the light most favorable to the non-moving party. *Id.* We will "reverse the denial of such a motion only if reasonable persons could not have reached the conclusion that the jury embraced." *Sanchez* v. *Puerto Rico Oil Co.,* 37 F.3d 712, 716 (1st Cir. 1994).

The record shows sufficient evidence to support the jury's verdict. Defendants content that there was no material omission because Simons testified that he told Larry Ansin, in early 1992, about the initial contact with J.C. Bradford. However, Simons himself never claimed that he had told Ansin about J.C. Bradford's specific recommendations as to the possible timing of an IPO, or that he had told Ansin about the valuation analyses performed by the investment bank. Nor did Simons or Keenum mention the possibility of an IPO to Maraghy at the time of the negotiated sale. Thus, even crediting Simons' uncorroborated testimony, which the jury need not do, the jury could reasonably find that information about the IPO negotiations was omitted.

As to evidence of intent, defendants contend that there was no possible motive for fraud, because River Oaks resold the Ansin shares to other insiders at the same price the corporation had paid for them, thereby depriving the corporation of the fruits of its fraud. However, the jury could reasonably infer, from the evidence, that the individual defendants, officers and directors of River Oaks, were working to exclude the Ansins, the only remaining non-management shareholders, from the River Oaks IPO, and

were seeking ultimately to benefit themselves and the other Mississippi management shareholders at the Ansins' expense.

Defendants also argue that there was no evidence that the undisclosed information was material. The materiality standard under the federal securities laws is a familiar one: Information is material if "there is a reasonable likelihood that a reasonable investor would consider it important." *Glassman* v. *Computervision Corp.*, 90 F.3d 617, 632 (1st Cir. 1996); *see also Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194, 1219 (1st Cir. 1996) (citing *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231-232 (1988)). This court has repeatedly held that the question of the materiality of omitted information is one peculiarly for the trier of fact. *See Lucia* v. *Prospect St. High Income Portfolio, Inc.*, 36 F.3d 170, 176 (1st Cirl 1994) (citing cases).

Defendants contend that the prior discussions with J.C. Bradford were insignificant because no negotiations were ongoing at the time of the Ansin repurchase. However, the evidence showed that less than two weeks after the Ansin repurchase, River Oaks' management was "looking at a July or August 1993" IPO, and adjusting its accounting strategies accordingly. This is not a case where the defendants themselves "placed no special significance" on the omitted information. *Cf. Jackvony* v. *RIHT Fin. Corp.*, 873 F.2d 411, 415 (1st Cir. 1989); *Taylor* v. *First Union Corp.*, 857 F.2d 240, 244 (4th Cir. 1988)("vague agreement" as to future merger not material where neither "the factual nor the legal" predicates for transaction were in place). The jury's conclusion that the earlier negotiations were material is patently reasonable.

Finally, defendants contend that there was no evidence of reliance on the omissions. Because of the logical impossibility of proving that plaintiffs relied on information that they

did not have, "[p]ositive proof of reliance on omissions is not necessary where materiality has been established." *Holmes* v. *Bateson,* 583 F.2d 542, 558 (1st Cir. 1978). In any case, Harold Ansin testified that he did rely on information obtained from Simons.

Thus, defendants' insufficiency arguments with regard to the securities law and fraud claims are unavailing. A reasonable jury could, and did, conclude that defendants intentionally defrauded plaintiffs by failing to disclose material information about the contemplated IPO.

B. The Breach of Contract Claim

The defendants also argue that what plaintiffs styled a breach of contract claim is essentially a conversion claim, and therefore barred by the statute of limitations. They also claim that the evidence was insufficient to support the jury verdict on this claim, and that Harold Ansin and the Ansin Foundation lack standing to bring this claim.

1. Statute of Limitations

Defendants argue that plaintiffs simply recast their time-barred conversion claim as a breach of contract claim,[6] and that this claim should therefore be subject to the Massachusetts three-year tort statute of limitations (Mass. Gen. Laws ch. 260, §2A), rather than the Massachusetts six-year contract statute (Mass. Gen. Laws ch. 260, § 2).[7]

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[6] Although defendants suggest that plaintiffs repleaded their conversion claim as breach of contract *after* the district judge had found that their tort claim was barred, this is factually incorrect. Moreover, the district judge, in his opinion granting summary judgment on the conversion claim, specifically noted that, although the contract claim pleaded the same facts, defendants had not moved for summary judgment on that claim and that his ruling did not reach that count.

[7] The parties agree that Massachusetts law supplies the applicable statute of limitations.

Defendants cite Massachusetts caselaw for the principle that "the determination of whether the contract or tort statute of limitations applies is controlled by the essential nature of [the] claim." *Oliveira* v. *Pereira,* 605 N.E.2d 287, 290 (Mass. 1992). This principle may be useful in determining what statute of limitations to apply to a statutory claim, where the statute giving rise to the cause of action does not specify a limitations period. *See e.g., id.* at 289-91. It may also apply in the extreme case in which a personal injury, such as emotional distress, is inappropriately cast as a breach of contract. *See Pagliuca* v. *City of Boston,* 626 N.E.2d 625, 628 (Mass. Ct. App. 1994). However, this principle has not been held to restrict plaintiffs to a single theory of liability per set of operative facts, where such facts can fairly support two theories of liability.

Here, the plaintiffs' claim—that their shares were transferred without their knowledge or consent, in derogation of contractual terms—can be fairly characterized as either an action for conversion or an action for breach of contract. It does not involve the type of "accident[] resulting in injuries to person or property" on which the draftsmen of Massachusetts' three-year tort statute focussed. *Royal-Globe Ins. Co.* v. *Craven,* 585 N.E.2d 315, 320 (Mass. 1992). Rather, it does involve a claim "to recover from another money which in equity and good conscience he is not entitled to keep." The latter type of claim, according to the Supreme Judicial Court, is usually advanced in a contract action. *Kagan* v. *Levenson,* 134 N.E.2d 415, 417 (Mass. 1956). In these circumstances, it was not error for the district court to apply the six-year contract statute of limitations to plaintiffs' contract claim.

2. Insufficiency of the Breach of Contract Evidence and Enforceability of Rights

The defendants assert that there is no evidence that Larry Ansin did not agree to the reduction in shares. They also deny that the foundation corporate documents of River Oaks created enforceable rights in the plaintiffs. This is simply not so.

As with the fraud claims, defendants rely on Simons' uncorroborated report of his phone conversation with Larry Ansin. With regard to the contract claim, Simons testified that, in early 1989, Ansin orally agreed to a reduction in his percentage of ownership. Simons does not assert that he mentioned specific numbers of shares to Ansin, nor does he claim that Ansin received any compensation for these transfers. Simons testified that Larry Ansin did not agree to transfer shares to himself or to Franks (the recipients of the shares). Simons and Keenum both acknowledged that there was no documentation of these transfers.

Simons described a complex reallocation of shares, undertaken to allow shares to be issued to new key personnel. However, Keenum acknowledged that 25,000 new shares were issued in 1989, and that the new employees were issued exactly 25,000 shares. This negated the reallocation as a reason for the reduction in Ausin's shares. Additionally, in the reallocation described by Keenum, only Harold Ansin had to give up shares; Simons' percentage of ownership was diluted by the new issuance, but he actually gained 1,000 shares (from the alleged transfer from Ansin).

Even if the jury credited Simons' description of Larry Ansin's oral consent, the jury could have reasonably inferred that Ansin only consented to dilution, and not to a transfer of shares. Additionally, when evaluating a series of events that, judging from the trial exhibits, left a heavy paper trail, the jury was entitled to draw inferences from the *complete*

absence of contemporaneous documentation of the purported Ansin transfers.

Defendants also contend that the foundational documents of River Oaks did not create any rights in the Ansins with regard to transfers. Defendants do not challenge the basic premise that, under Mississippi law, such documents may form a contract. Rather, they contend that the specific transfer provisions were only for the benefit of the corporation, and thus created no rights in the shareholders. However, the plain language of the Subscription Agreement states that "this Agreement shall be binding upon and shall *inure to the benefit of each individual Stockholder* . . . and to the Company . . . ." While the transfer provisions of the Articles of Incorporation and the By-Laws may have been primarily intended to prevent the unauthorized sale of shares to outsiders, as defendants contend, this does not mean that they served no other purpose.

To the contrary, the traditional common law of unauthorized transfers places heavy duties on the corporation:

> Courts held that a corporation whose stock was transferable only on the books of the company was, to a certain extent at least, a trustee for its shareholders in respect to their stock. . . . [I]t had to respond in damages for any injury sustained by them in consequence of its negligence or misconduct. . . . This liability rested . . . upon the ground of breach of contract upon the part of the company, of this undertaking to hold the stock for the benefit of the true owner of the certificate.

12 *Fletcher Cyclopedia of the Law of Corporations* § 5538, at 406 (perm. ed. 1996)(footnotes omitted). Moreover, the Cyclopedia explains that:

> The shareholders also have a right to expect that the corporation will observe its own bylaws in relation to the transfer, and it is liable for any damages resulting to them by reason of its failure to do so.

Id. (footnotes omitted).

This authority is sufficient to rebut defendants' contention that the plain language of River Oaks' transfer provisions can only be read to create rights in the corporation. The defendants point to nothing in either the documents or in Mississippi law that would require a jury to conclude that River Oaks shareholders had no rights under these documents as to transfers. Accordingly, the jury's verdict on the breach of contract claim stands.

3. Standing

The defendants assert that Harold Ansin and the Ansin Foundation lack standing to bring a contract claim because they were not in privity of contract with River Oaks. However, defendants acknowledge that Larry Ansin's estate would have standing to bring such a suit, were it not for the fact that, in their view, Larry Ansin acquiesced in the breach and suffered no damages. The jury plainly rejected these assertions. Assuming *arguendo* that defendants are correct that, as a matter of Mississippi law, Harold Ansin could not bring this suit, we find that, as Larry Ansin's estate indisputably had standing, this claim has no possible bearing on the outcome of the case.

C. The Breach of Fiduciary Duty Claim

Defendants take the position that, under Mississippi law, shareholders may not sue, as individuals, for breach of fiduciary duty by the officers and directors of a close corporation. However, Mississippi case law recognizes the ability of shareholders in close corporations to sue for

breach of fiduciary duty. *See Fought* v. *Morris,* 543 So. 2d 167, 172-73 (Miss. 1989). The Mississippi Supreme Court has specifically stated, in the context of a suit for diversion of corporate opportunity, that a trial court may, "in the case of a closely held corporation, . . . treat an action raising derivative claims as a direct action . . . and order an individual recovery." *Derouen* v. *Murray,* 604 So. 2d 1086, 1091 n.2 (Miss. 1922). Defendants' argument as to the fiduciary duty claim is without merit.

D. Affirmative Defenses

Defendants assert that equitable defenses barred both the contract claim and the fraud claims. Defendants did not submit these affirmative defenses - laches, waiver, ratification and estoppel - to the jury. Instead, in a post-trial motion pursuant to Rule 49(a), defendants requested the district judge to rule on the applicability of these affirmative defenses. The district court denied this motion, without opinion.

Under Rule 49(a), if the district court does not make a finding on an issue not submitted to the jury, "it will be presumed on appeal that the lower court made whatever finding was necessary in order to support the judgment that was entered." 9A Wright & Miller, *Federal Practice and Procedure,* § 2507, at 185-86 (1995); *see also Kavanaugh* v. *Greenlee Tool Co.,* 944 F.2d 7, 11-12 (1st Cir. 1991). As the district court entered a judgment for the plaintiffs, we presume that it found that defendants had not proven the claimed equitable defenses.

The defendants argue that the breach of contract claim was barred by laches, based on the district court's finding, in the context of the conversion claim, that the Ansins should have discovered the reduction in their interest when signing the 1989 tax documents. The defense was prejudiced

by plaintiffs' delay in filing suit until 1993, defendants argue, because Larry Ansin died in the interim.

We review the district court's determination as to laches for abuse of discretion. *See Murphy* v. *Timberlane Reg'l Sch. Dist.*, 973 F.2d 13, 16 (1st Cir. 1992). The parties have not adequately addressed which law governs this issue. However, Massachusetts and Mississippi law (as well as general principles of equity) are consistent on this point, and so there is no need to address the conflicts question.

If the statute of limitations has not run, as is the case here, the defendant bears a heavy burden of demonstrating the unreasonableness of delay and the occurrence of prejudice. *See K-Mart Corp.* v. *Oriental Plaza, Inc.*, 875 F.2d 907, 911 (1st Cir. 1989); *Hans* v. *Hans*, 482 So. 2d 1117, 1121 (Miss. 1986) ("no claim is barred by laches until the limitation has attached"); *cf. Srebnick* v. *Lo-Law Transit Mgmt., Inc..*, 557 N.E.2d 81, 85 (Mass. Ct. App. 1990) ("As long as there is no statute of limitations problem, unreasonable delay in pressing a legal claim does not, as a matter of substantive law, constitute laches."). Also, the district court could have found that defendants' unsavory conduct precluded them from arguing that they reasonably relied on the plaintiffs' acquiescence in the transfer of shares. *See K-Mart Corp.*, 875 F.2d at 911 (party seeking to invoke laches should not "call . . . attention to [its] left hand while surreptitiously pocketing the family jewels with [its] right hand"). Under these circumstances, it was not an abuse of discretion for the district court to find the defense of laches inapplicable.

Defendants also argue that plaintiffs' two-month delay between learning of the planned IPO and filing suit constitutes laches, waiver, estoppel, and ratification so as to bar the fraud claims. Any claim of prejudice to the defendants from this delay is tenuous, as Larry Ansin had already died when Patrick Maraghy learned of the planned IPO. Given

the maxim that "he who comes into equity must come with clean hands," *see, e.g. Texaco Puerto Rico, Inc.* v. *Dep't of Consumer Affairs*, 60 F.3d 867, 880 (1st Cir. 1995), the district court did not abuse its discretion by declining to apply these equitable defenses to plaintiffs' fraud claims.

E. Compensatory Damages

1. Securities Law

The Supreme Court has held that damages under Rule 10b-5 should be "the difference between the fair value of all that the . . . seller received and the fair value of what he would have received had there been no fraudulent conduct." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972); *see also Holmes*, 583 F.2d at 562. On the Ansins' securities law claim, the court instructed the jurors to find "the difference between what the Ansins actually received for their stock and what you believe they would have received had they refused to sell or, instead, insisted on different terms." The jury was told that "the issue is not hindsight," and that they "must evaluate the Ansins' decision in light of the facts and circumstances that existed at the time that the decision to sell was made."

Defendants argue that the district court's jury instructions as to the damages for the fraud claims were flawed, in that the district court failed to tell the jury to determine value *as of the time of the fraudulent transaction*, i.e. in November 1992. The jury awarded damages of $12 per share, the public offering price of River Oaks.[8] This was less than the

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[8] The jury award apparently was based on the premise that the Ansins would have participated in the 28.8 for 1 stock split. The jury then deducted the $300,000 the Ansins had actually received for their stock. The jury did not, apparently, include compensatory damages for the R-O Realty shares, or for the S corporation earnings distributed to former shareholders at the time of the offering.

$17.40 a share which plaintiffs sought and more than the damages defendants say are the maximum allowable. Defendants contend that the pre-IPO value of the company was much lower, and support this contention by pointing to the immediate resale of the Ansin shares to knowledgeable insiders at the same price paid to the Ansins.

The federal securities statutes are not explicit as to the proper measure of damages. Section 28 of the Securities Exchange Act limits recovery to "actual damages on account of the act complained of." 15 U.S.C. § 78bb. The definition of "actual damages," however, has been left to the courts. This question presents difficulties, which are greatest in cases involving closely held securities that have no readily ascertainable market value. *See* 3 Bromberg & Lowenfels, *Securities Fraud & Commodities Fraud* § 9.1, at 228 (2d ed. 1996).

The trier of fact may draw reasonable inferences in determining "fair value," and "is not restricted to actual sale prices in a market so isolated and so thin" as one for a close corporation's stock. *Affiliated Ute,* 406 U.S. at 155. A variety of factors, including anticipated future appreciation, may affect the value of stock, so that an appraisal of value "demand[s] a more sophisticated approach than the simple application of a price index to the shares." *Holmes,* 583 F.2d at 564.

Here, the very nature of the fraud was to induce the plaintiffs to sell their stock at a time before the stock would appreciate in value due to the contemplated IPO and stock split. To adopt defendants' argument that damages cannot exceed the price of the shares at the time of the sale would be to reward and encourage such chicanery. Defendants' attempt to limit plaintiffs' recovery to a hypothetical "market" price as of November 1992 is unavailing. The trier of fact was entitled to infer that a reasonable investor,

fully informed of the IPO discussions, including the conditions set by J.C. Bradford, would not have sold his stock in November 1992 for less than his proportionate share of the IPO proceeds.

The anticipated appreciation in the value of the stock was not unforeseeable. Internal River Oaks documents as to planning and projections indicated that a 1993 IPO was anticipated. J.C. Bradford analysts had suggested a range of values for the company in light of the anticipated IPO, information which was withheld from the plaintiffs. That these analyses and projections were, to some extent, contingent does not mean that they are irrelevant to determining fair value. As another court of appeals has said:

> The relevance of the fact [that the defendant close corporation was involved in merger negotiations] does not depend on how things turn out. Just as a lie that overstates a firm's prospects is a violation even if, against all odds, every fantasy comes true, so a failure to disclose an important beneficent event is a violation even if things later go sour. The news . . . allows investors to assess the worth of the stock. . . . Investors will either hold the stock or demand a price that reflects the value of that information.

Jordan v. *Duff & Phelps, Inc.*, 815 F.2d 429, 440 (7th Cir. 1987)(internal citation omitted). In these circumstances, the IPO price was a reasonable approximation of fair value. We note it was less than the aftermarket price plaintiffs suggested as damages.[9]

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[9] We also note that the damages here are consistent with the rule of *Janigan* v. *Taylor*, 344 F.2d 781 (1st Cit. 1965). In *Janigan*, this court held that, when property is sold to the fraud-committing party, even "future accretions not foreseeable at the time of transfer . . . are subject to another factor, viz., that they accrued to the fraudulent party." *Id.* at 786. While the individual defendants did not purchase all the Ansins' stock, the rest of the Ansins' shares were sold to other knowledgeable River Oaks insiders, who thereby reaped the profits of defendants' fraud.

Defendants draw our attention to two district court cases. In *Ross* v. *Licht,* 263 F. Supp. 395 (S.D.N.Y. 1967), the court based damages for failure to disclose IPO plans not on the IPO price, but on the lower price obtained in an intervening private placement. *Id.* at 411. However, as one commentary has pointed out, the court was "probably justified" in using the lower measure because the private placement was a necessary precondition to the public offering. Bromberg & Lowenfels, *supra,* § 9.1, at 228 n.12. Defendants have pointed to no such determinative intervening event here. Defendants also point to *Hutt* v. *Dean Witter Reynolds, Inc.,* 737 F. Supp. 128 (D. Mass. 1990). In *Hutt,* the accretion in value was due to the stock's trading in a public market over time. The court accordingly found plaintiffs' potential profits to be "too speculative." *Id.* at 133. Here, by contrast, plaintiffs point to a specific, planned-for event.

Because we affirm the award of damages on the federal securities law claim, we do not reach the state fraud claim. *Holmes,* 583 F.2d at 560.

2. Breach of Contract

Defendants also appeal the award of damages on the contract claim, arguing the jury should have been told to value damages "as of the time of the breach." The district court instructed the jury to determine when the Ansins would have sold the missing 3,500 shares, and to determine what they would have received at that time. The jury apparently determined that the Ansins would have held the shares until the IPO, and awarded $12 per share, accounting for the 28.8 for 1 stock split. Whatever the merits of defendants argument, they failed to object to the court's instruction at trial, and so the issue has not been preserved for appeal.[10]

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[10] Defendants do not attempt to contend that the challenged instruction constituted plain error.

See Fed R. Civ. P. 51; *Pinkham* v. *Burgess,* 933 F.2d 1066, 1069 (1st Cir. 1991). The contract award of compensatory damages is affirmed.

F. Punitive Damages

Defendants argue that the award of punitive damages cannot be sustained because such damages are unavailable under the securities laws and under Mississippi law. Although the defendants are right as to the securities laws, *see* 15 U.S.C. § 78bb, the district court correctly instructed the jury on the Mississippi law on punitive damages.

"The rule in Mississippi is settled that punitive damages are not recoverable for a breach of contract unless such breach is attended by intentional wrong, insult, abuse, or such gross negligence that amounts to an independent tort." *Aetna Cas. and Sur.* v. *Steele,* 373 So. 2d 797, 801 (Miss. 1979). Breach of fiduciary duty has been recognized by the Mississippi courts as an "extreme or a special additional circumstance where punitive damages may be awarded." *Fought,* 543 So. 2d at 173 (internal quotation marks omitted). The jury found such a breach of duty here.

Defendants contend that plaintiffs were required to adduce evidence as to defendants' net worth. Plaintiffs correctly respond that, under Mississippi law, the net worth inquiry is only one factor to be considered where the court seeks to determine if the punitive damages awarded by the jury are so excessively disproportionate as to shock the conscience of the court. *See Bankers Life & Cas. Co.* v. *Crenshaw,* 483 So. 2d 254, 279 (Miss. 1985) ("[N]o hard and fast rule may be laid down with regard to the maximum amount of punitive damages that may be awarded in a given case."). That proportionality threshold is not crossed here. In any case, some evidence of defendants' net worth can be inferred from the evidence as to their River Oaks holdings.

"The award of punitive damages and the amount thereof is within the discretion of the trier of fact." *Fought,* 543 So. 2d at 173. "On appeal, an award will be disturbed where it is so excessive that it evinces passion and prejudice on the part of the jury so as to shock the conscience of the court." *Valley Forge Ins. Co.* v. *Strickland,* 620 So. 2d 535, 541 (Miss. 1993) On the facts of this case, there was no abuse of discretion. The award of punitive damages is affirmed.

IV.

Plaintiffs appeal the dismissal of their Mass. Gen. Laws ch. 93A claim. They also argue that the district judge erred in failing to award prejudgment interest and in dismissing their conversion claim. Because we affirm the jury's award on the contract claim, we need not reach the Ansins' contention with respect to the conversion claim.

A. The 93A Claim

Plaintiffs claim that the actions of River Oaks, Simons, and Keenum in the various transactions at issue here constitute unfair and deceptive business practices within the meaning of Mass. Gen. Laws ch. 93A, §§ 2, 11. The district court granted judgment on the pleadings for defendants. Review is *de novo*. *United States* v. *Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 619 (1st Cir. 1996).

Mass. Gen. Laws ch. 93A gives a private right of action to any person injured by "an unfair or deceptive act or practice" in trade or commerce "directly or indirectly affecting the people of this Commonwealth." Mass. Gen. Laws ch. 93A, §§ 2, 9. Before January 1988, the statute was construed as not applying to securities laws claims *See, e.g.*, *Cabot Corp.* v. *Baddour*, 477 N.E.2d 399, 402 (Mass. 1985). In 1987, the Massachusetts legislature amended the definitions section of the statute so that "trade" and

"commerce" now include "the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of . . . any security." Mass. Gen. Laws ch. 93A, §1(b). "Security" is defined broadly under Massachusetts law to include any stock. Mass. Gen. Laws ch. 110A, § 401(k).

The Supreme Judicial Court has construed ch. 93A as covering marketplace transactions, but not transactions "principally 'private in nature.'" *See Manning* v. *Zuckerman*, 444 N.E.2d 1262, 1266 (1983). Transactions between joint venturers and fiduciaries who are part of a "single legal entity" do not meet the statute's jurisdictional "trade or commerce" requirement. Gilleran, *The Law of Chapter 93A* §2:18, at 38-39 (1989). This principle was recently clearly restated in *Szalla* v. *Locke*, 657 N.E.2d 1267 (Mass. 1995):

> It is well established that disputes between parties in the same venture do not fall within the scope of G.L. c. 93A, § 11. . . . The development of c. 93A suggests that the unfair or deceptive acts or practices prohibited are those that may arise between discrete, independent business entities, and not those that may occur within a single company.

Id. at 1269 (internal citations omitted).

Szalla, in offering examples of the types of disputes not covered, cited *Zimmerman* v. *Bogoff*, 524 N.E.2d 849 (Mass. 1988), for the principle that "c. 93A [is] inapplicable to transactions and disputes between parties to [a] joint venture and fellow shareholders in a close corporation." It also cited *Riseman* v. *Orion Research*, 475 N.E.2d 398 (1985), for the principle that "c. 93A [is] inapplicable to claims by [a] corporate stockholder against [a] corporation stemming from [a] dispute as to [the] internal governance of [the] corporation." *Szalla*, 657 N.E.2d at 1269.

The plaintiff in *Szalla*, who was the business partner of the defendant, attempted to argue that the statutory definition of "trade or commerce" included the act of "offering for sale . . . any services." *Id.* at 1270. The trial court had found that the plaintiff, upon becoming partners with the defendant, had "sold his services to the business entity being formed by the parties." *Id.* The Supreme Judicial Court found that, on these facts "[t]here ha[d] been no commercial transaction . . . in the sense required by c. 93A . . . . [T]he 'services contemplated by this definition are those offered generally by a person for sale to the public in a business transaction.'" *Id.* (quoting *Manning* v. *Zuckerman*).

Here, plaintiffs argue that the statutory amendment, which included the sale of securities in the definition of "trade or commerce," makes the "trade or commerce" inquiry irrelevant. We read *Szalla*, particularly its citation of *Zimmerman*, to require an independent analysis of whether the transaction involved had a public aspect, even where the subject matter of the transaction is included in the definitional section of the statute.

Another case, *Puritan Medical Center* v. *Cashman*, 596 N.E.2d 1004 (Mass. 1992), is of assistance. There, the trial court found that the defendants, shareholders in a close corporation, had engaged in unfair and deceptive trade practices when they locked the plaintiff corporation out of space that had previously been rented to the corporation. *Id.* at 1006. On appeal to the Supreme Judicial Court, defendants argued that they were not liable under ch. 93A because "the parties were acting as fiduciary participants in a closely held corporation rather than as separate entities in a public market setting." *Id.* at 1012. The SJC stated: "We agree," and reversed. *Id.*

After explaining that the transactions at issue were principally private in nature, the *Puritan Medical Center* opinion continued:

> Further, *the aggrieved party has available an alternative avenue of relief in the form of a suit for breach of fiduciary duty*.
>
> [I]f the defendants committed any unfair or deceptive acts, they necessarily occurred in the context of the parties' [shareholder] relationship . . . or arose out of that relationship . . . and not in an arm's-length commercial transaction between distinct business entities.

Id. at 1012 (emphasis added)(internal citations omitted).

Here, the Ansins' suit is largely premised on River Oaks' status as a close corporation. There is no suggestion that these events could have or did transpire in a public market situation. Moreover, the Ansins have actually recovered on a fiduciary duty claim. Guided by the Massachusetts precedents, we find that this dispute amongst shareholders of a close corporation does not meet the jurisdictional "trade or commerce" requirement of Mass. Gen. Laws ch. 93A.

B. Prejudgment Interest

The plaintiffs argue that the district court erred by failing to award prejudgment interest. The original jury instructions contained no mention of prejudgment interest. At sidebar, plaintiffs' counsel requested a jury instruction on prejudgment interest "in order to preserve our right to prejudgment interest as awarded by anybody," the judge or the jury. Accordingly, after the jury returned its verdict for plaintiffs, the judge gave the jury a special interrogatory on prejudgment interest, instructing the jury that "[w]hether you choose to award interest is entirely a matter in your discretion." Plaintiffs' counsel did not object to this form of in-

struction. The jury did not award prejudgment interest. Post-trial, plaintiffs moved for entry of judgment including pre-judgment interest. The district court denied this motion as moot.

Plaintiffs argue, on appeal, that there is a presumption in favor of prejudgment interest under the federal securities laws, and that the district court judge failed to so instruct hte jury. Plaintiffs failed to make a contemporaneous objection to the form of the jury instruction, and, absent plain error, this argument is waived.

However, plaintiffs also point out that, under a Mississippit statute enacted in 1989, judgments "shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint." Miss. Code Ann. § 75-17-7. This statutory language, they assert, mandates an award of prejudgment interest on their state law claims. We do not read the statutory language, which does not distinguish between pre- and post-judgment interest, so broadly. The Mississippi case law indicates that the award of prejudgment interest remains within the discretion of the trial judge. *See American Fire Protection, Inc.* v. *Lewis*, 653 So. 2d 1387, 1391 (Miss. 1995)(depending on circumstances, prejudgment interest may or may not be proper, but should be allowed where necessary to adequately compensate plaintiff); *Sunburst Bank* v. *Keith*, 648 So. 2d 1147, 1152 (Miss. 1995) ("award of prejudgment interest is normally left to the discretion of the trial judge").

The law of this circuit similarly recognizes the discretion of the trial judge in cases involving violations of the federal securities laws. *See Riseman* v. *Orion Research*, 749 F.2d 915, 921 (1st Cir. 1984). There was no abuse of discretion in the trial court's decision to abide by the jury's finding on prejudgment interest.

V.

Plaintiffs point to a clerical error in the Amended Judgment. We therefore direct the Clerk of the United States District Court for the District of Massachusetts to amend the judgment so that postjudgment interest accrues as of May 15, 1996, the date of the Original Judgment. In all other respects, the judgment is *affirmed*.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 93-12170-RGS

HAROLD S. ANSIN, ET AL.

v.

RIVER OAKS FURNITURE, INC., ET AL.

AMENDED JUDGMENT IN A CIVIL CASE
JULY 11, 1996

STEARNS, D.J.

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED as to Counts I and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant River Oaks Furniture, Inc., in the amount of One Million Eighty-Two Thousand Four Hundred Dollars ($1,082,400).

IT IS FURTHER ORDERED AND ADJUDGED as to Count II(A) of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant River Oaks Furniture, Inc., in the amount of One Million Two Hundred Nine Thousand Six Hundred Dollars ($1,209,600).

IT IS FURTHER ORDERED AND ADJUDGED as to Count I, III and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant Stephen L. Simons in the amount of One Million Ninety Eight Thousand Eight Hundred Forty Dollars ($1,098,840).

IT IS FURTHER ORDERED AND ADJUDGED as to Counts I, III and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant Thomas D. Keenum, Sr., in the amount of One Million Ninety Eight Thousand Eight Hundred Forty Dollars ($1,098,840).

IT IS FURTHER ORDERED AND ADJUDGED as to Counts III and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant Stephen L. Simons for punitive damages in the amount of Twenty Five Thousand Dollars ($25,000).

IT IS FURTHER ORDERED AND ADJUDGED as to Counts III and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant Thomas D. Keenum, Sr., for punitive damages in the amount of One Hundred Thousand Dollars ($100,000).

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to 28 U.S.C. § 1961(a), postjudgment interest will accrue from the date of the entry of this judgment on all judgment amounts, as referenced above.

IT IS FURTHER ORDERED AND ADJUDGED that all other claims, counts and counterclaims are hereby dismissed.

ROBERT J. SMITH, JR., CLERK

BY: /s/ Elaine I. Flaherty
Deputy Clerk
United States District Court

Dated: 7/11/96

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 93-12170-RGS

HAROLD S. ANSIN, ET AL.

v.

RIVER OAKS FURNITURE, INC., ET AL.

JUDGMENT IN A CIVIL CASE
May 6, 1996

STEARNS, D.J.

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED as to Counts I and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant River Oaks Furniture, Inc., in the amount of One Million Eighty-Two Thousand Four Hundred Dollars ($1,082,400).

IT IS FURTHER ORDERED AND ADJUDGED as to Count II(A) of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant River Oaks Furniture, Inc., in the amount of One Million Two Hundred Nine Thousand Six Hundred Dollars ($1,209,600).

IT IS FURTHER ORDERED AND ADJUDGED as to Count I, II(A), III and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant Stephen L. Simons in the amount of Two Million Three Hundred Eight Thousand Four Hundred Forty Dollars ($2,308,440).

IT IS FURTHER ORDERED AND ADJUDGED as to Counts I, II(A), III and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant Thomas D. Keenum, Sr., in the amount of Two Million Three Hundred Eight Thousand Four Hundred Forty Dollars ($2,308,440).

IT IS FURTHER ORDERED AND ADJUDGED as to Counts II(A), III and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant Stephen L. Simons for punitive damages in the amount of Twenty Five Thousand Dollars ($25,000).

IT IS FURTHER ORDERED AND ADJUDGED as to Counts II(A), III and IV of the Third Amended Complaint, judgment is entered in favor of plaintiffs as against defendant Thomas D. Keenum, Sr., for punitive damages in the amount of One Hundred Thousand Dollars ($100,000).

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to 28 U.S.C. § 1961(a), postjudgment interest will accrue from the date of the entry of this judgment on all judgment amounts, as referenced above.

IT IS FURTHER ORDERED AND ADJUDGED that all other claims, counts and counterclaims are hereby dismissed.

ROBERT J. SMITH, JR., CLERK

BY: /s/ Mary Olson Robbins
Deputy Clerk
United States District Court

Dated: May 6, 1996

Post-judgment interest to date is at the rate of 5.60%.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 93-12170-RGS

HAROLD S. ANSIN, INDIVIDUALLY
AND AS TRUSTEE OF THE ANSIN FOUNDATION;
PATRICK B. MARAGHY, AS
TRUSTEE OF THE ANSIN FOUNDATION;
JOSEPH L. ANSIN, AS TRUSTEE OF
THE ANSIN FOUNDATION; AND
RICHARD N. THIELEN, AS EXECUTOR OF
THE ESTATE OF LAWRENCE ANSIN

v.

RIVER OAKS FURNITURE, INC.,
STEPHEN L. SIMONS AND
THOMAS D. KEENUM, SR.

MEMORANDUM OF DECISION
AND ORDER ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

November 14, 1995

STEARNS, D.J.

This memorandum confirms the tentative decision

announced at the conclusion of the oral argument on defendants' motion for summary judgment. In the light most favorable to the plaintiffs as the nonmoving parties, the facts can be summarized as follows. Harold and Lawrence Ansin, a father and his son (now deceased),[1] claim that they, and a family charitable foundation, were defrauded by fellow shareholders of River Oaks Furniture, Inc. (River Oaks), a closely held Mississippi Subchapter S corporation. In 1987 Lawrence purchased 7,500 shares of original issue stock in River Oaks for $100,000. Lawrence's shares constituted ten percent of the total authorized. Lawrence also received 500 of 4,000 shares issued in R-0 Realty, Inc., a subsidiary formed to hold title to real estate leased to River Oaks. On May 31, 1988, Lawrence sold the River Oaks shares to his father for $100,000.[2]

In conjunction with the filing of its 1989 U.S. Corporate Income Tax Return, River Oaks provided Harold Ansin with a shareholder's Schedule K-1. The Schedule K-1 stated that Harold Ansin owned four percent of River Oaks. As plaintiffs concede, "[o]n its face . . . the K-1 reflected a dilution of [Harold Ansin's] ownership interest" from ten percent of River Oaks to four percent. Neither Ansin questioned the diminution. Harold Ansin forwarded the Schedule K-1 to his tax advisors who used it in preparing his personal 1989 federal income tax return. In late 1989, at the Ansins' insistence, River Oaks provided Harold Ansin with

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[1] Lawrence Ansin died on June 24,1993. Richard Thielen, the executor of his estate, is a named plaintiff.

[2] Lawrence retained his 500 shares in R-O Realty. In early 1991, Lawrence and Harold executed a repurchase agreement. The agreement obligated Lawrence to buy back his father's River Oaks shares, if asked, for $200,000, twice what Harold had paid. The repurchase agreement recited the figure "7,500 shares."

a stock certificate in the amount of 4,000 shares. Neither Ansin questioned the number of shares indicated on the certificate.

In early 1992, the River Oaks Board of Directors began discussing a public stock offering. Based on the valuations of an investment banker hired to take River Oaks public, the Directors estimated the worth of the company at $25 million. On the banker's advice, the Directors delayed consideration of the offering for one year. In July of 1992, the Treasurer of River Oaks, Walter Billingsley, approached plaintiff Patrick Maraghy, Lawrence Ansin's financial advisor, seeking additional guarantees from Lawrence for River Oaks' outstanding debt. Because of Lawrence Ansin's failing health, Maraghy refused this and several subsequent overtures. Sometime thereafter, the defendant Stephen Simons, the Chairman of the Board of River Oaks, and defendant Thomas Keenum, the General Counsel, approached Maraghy with an offer to reacquire the Ansin shares. According to the plaintiffs, the defendants presented a falsely pessimistic projection of River Oaks' profitability and false estimates of the value of the Ansin shares. Moreover, they did not disclose the fact that River Oaks was contemplating a public stock offering. The Ansins eventually agreed to sell the River Oaks and R-O Realty shares to the defendants for $300,000. (As part of the consideration, River Oaks also agreed to the cancellation of Lawrence Ansin's debt guarantees. On November 6, 1992, Harold Ansin donated his River Oaks shares to his family charity, the Ansin Foundation. On November 24, 1992, the Ansins, through an escrow agent, conveyed 4,000 shares of River Oaks stock and 500 shares of R-O Realty stock to River Oaks in exchange for a $300,000 check payable to the Ansin Foundation.

In March of 1993, the Directors authorized a public offering of River Oaks stock. On June 25, 1993, River Oaks filed a Form S-1 Registration Statement with the Securities and Exchange Commission listing the appraised value of the company at $50.6 million. The successful offering reaped large dividends for holders of River Oaks stock.

DISCUSSION

The Amended Complaint encapsulates two basic theories of fraud. Plaintiffs first claim a fraudulent conversion of Harold Ansin's shares in River Oaks. Plaintiffs' second theory is that the defendants violated federal securities laws by fraudulently inducing the Ansins to sell their River Oaks and R-O Realty shares.

Count II of the Amended Complaint alleges a conversion when in 1989, without explanation, Harold Ansin's ownership interest in River Oaks was reduced from 7,500 to 4,000 shares and his equity interest from ten to four percent. Under Massachusetts law[3] an action for conversion is governed by the tort statute of limitations of three years, M.G.L. c. 260, §2A. See Woodcock v. American Investment Co., 376 Mass. 169, 174 (1978). The Ansins'

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[3] Massachusetts has adopted Section 142 of the Restatement (Second) of Conflict of Laws. New England Tel. & Tel. Co. v. Gourdeau Const. Co., Inc., 419 Mass.658, 664 (1995). Under Section 142, the substantive law to be applied is that of the State with the most significant relationship to the occurrence and the parties. On matters of procedure, however, including the choice of a statute of limitations, the law of the forum state, in this case Massachusetts, governs.

lawsuit was filed on October 4, 1993. The conversion claim was added by amendment on June 17, 1994. Under the relation-back doctrine, the claim is treated as if it had been filed at the inception of the suit. Fed. R. Civ. P. 15(c)(2). Accordingly, the applicable statute of limitations bars any claim whose existence was known or should have been known to the Ansins prior to October 4, 1990.

"Where summary judgment is sought on the basis of a statute of limitations, once the defendant establishes that the time period between the plaintiff's injury and the plaintiff's complaint exceeds the limitations period set forth in the applicable statute, the plaintiff bears the burden of alleging facts which would take his or her claim outside the statute." McGuiness v. Cotter, 412 Mass.617, 620 (1992). An otherwise untimely claim may be revived by the so-called "discovery rule." Under this equitable doctrine, a cause of action accrues only when a plaintiff has "(1) knowledge or sufficient notice that [he] was harmed and (2) knowledge or sufficient notice of what the cause of harm was." Bowen v. Eli Lilly & Co.. Inc., 408 Mass. 204, 208 (1990). Stated another way, "the action accrues when the injured party knew or, in the exercise of reasonable diligence, should have known, the factual basis for the cause of action." Tagliente v. Himmer, 949 F.2d 1, 4 (1st Cir. 1991) (emphasis in original). If a wrong is "inherently unknowable," or if a defendant deceptively conceals an injury or breaches a fiduciary duty to disclose the existence of a cause of action, the running of the statute is tolled. Puritan Medical Center, Inc. v. Cashman, 413 Mass. 167, 175 (1992). Absent a deceptive act or fiduciary omission, "a cause of action accrues on the happening of an event likely to put the plaintiff on notice." Hendrickson v. Sears, 365 Mass. 83, 89 (1974). "Reasonable notice that a . . . particular act of another person may have been a cause of harm to a plaintiff

creates a duty of inquiry and starts the running of the statute of limitations." Bowen, 408 Mass. at 210. Here at least three events, alone or together, should have alerted Harold Ansin to the alleged conversion, or at a minimum, caused him to make inquiry. All three events occurred on or before April 16, 1994. The first was the receipt of the 1989 Schedule K-1 indicating that the Ansin shares represented only four percent of River Oaks' equity. The second was the signing by Harold Ansin of his 1989 income tax return, which incorporated the four percent figure provided by River Oaks. And the third was Harold Ansin's receipt from River Oaks in late 1989 of a stock certificate in the amount of 4,000 shares. Plaintiffs have alleged no facts that could lead a reasonable jury to conclude that the defendants concealed from Harold Ansin the significance of the four percent/4,000 share figures or failed to disclose anything that their fiduciary duty required. As the defendants point out, there is no showing that either number was inaccurate when related by River Oaks. That Harold Ansin may have failed to appreciate the fact that he had been injured does not, under the circumstances, excuse his failure to diligently explore the existence of a litigable claim. White v. Peabody Construction Co., 386 Mass. 121, 130 (1982). Consequently, the motion to dismiss Count II of the Amended Complaint will be ALLOWED.[4]

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[4] Given the conclusiveness of this ground, it is not necessary to consider defendants' additional arguments for dismissal. Plaintiffs note that defendants have not moved for summary judgment on Count IIA of the Amended Complaint which alleges essentially the same facts as the conversion as a breach of contract (which under Massachusetts law is subject to a six year statute of limitations). Assuming that this passes muster, see Lareau v. Page, 39 F.3d 384 (1 st Cir.1994), the court will have to be persuaded whether under the law of Mississippi (or anywhere else), a corporate articles of incorporation and by-laws constitute an

As to the plaintiffs' second theory of fraud, which is based on alleged violations of section 10(b) and Rule 10b-5 of the Securities and Exchange Act, the defendants argue that Harold Ansin, in an individual capacity, lacks standing to pursue the action. This, defendants say, is because he was not a "purchaser or seller of securities" within the meaning of the Act. Rather, defendants contend that the Ansin Foundation, the recipient of Harold Ansin's 4,000 shares, is the only proper party to maintain the lawsuit. I disagree. After Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 745 (1975), it is clear that in a 10b-5 action, common law privity need not exist between a plaintiff seller and a defendant purchaser. Thus, a Rule 10b-5 action may be brought against persons who fraudulently induce a plaintiff to sell securities to a third party without offending the Act. See Baretne v. Barnett, 553 F.2d 290, 291 (2nd Cir. 1977). In some cases, there need not even be a "sale" in the common law sense, merely a functional equivalent. "In determining whether a party to a securities transaction is a 'purchaser' or 'seller,' we must ask whether the transaction has wrought a fundamental change in the nature of the plaintiff's investment .... We must focus upon the 'economic reality' of the transaction . . . and determine whether the transaction has 'transformed' the plaintiff's interests 'in any real sense."' Rathborne v. Rathborne, 683 F.2d 914, 920 (5th Cir. 1982).

An overriding purpose of the seller/purchaser requirement is to ensure that Rule 10b-5 not be stretched to cover plaintiffs who neither buy nor sell securities in any real or functional sense, but merely claim that they were induced not to. The reason is that any recovery on their part would be "largely conjectural and speculative," as "the

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enforceable contract between the corporation and its shareholders.

number of shares involved [would] depend on plaintiff's subjective hypothesis." Blue Chip Stamps, 421 U.S. at 735. See also Mullen v. Sweetwater Development Corp., 619 F. Supp. 809, 815 (D.C. Colo.1985). Blue Chip Stamps concerns are not implicated here. The amount of stock sold by Harold Ansin is quantifiable, not conjectural. The identity of the purchaser is known. The fact that the Ansin Foundation served as a tax conduit for the sale and received the proceeds is peripheral to the reality of the underlying transaction. Harold Ansin sold, and the defendants bought, 4,000 shares of River Oaks stock for $300,000.[5] The Blue Chip Stamps requirement is met.

As indicated at oral argument, I find that significant factual disputes exist as to each of the remaining elements of a securities violation. Consequently summary judgment as to Count I of the Amended Complaint will be DENIED.

ORDER

For the foregoing reasons, summary judgment as to Count II of the Second Amended Complaint is ALLOWED. As to Count I it is DENIED. Trial will commence on all outstanding claims at 9:00 A.M., January 22, 1996.

SO ORDERED.

Richard G. Stearns
UNITED STATES DISTRICT JUDGE

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[5] Harold Ansin is named as a plaintiff in both his individual capacity and in his capacity as a Trustee of the Ansin Foundation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1734 and 96-1735

HAROLD S. ANSIN, ET AL.,
Plaintiffs, Appellees,

v.

RIVER OAKS FURNITURE, INC., ET AL.,
Defendants, Appellants.

BEFORE

TORRUELLA, *Chief Judge,*
CYR, *Senior Circuit Judge,*
SELYA, BOUDIN, STAHL, and LYNCH, *Circuit Judges,*

ORDER OF COURT
Entered: March 13, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

WILLIAM H. NG
William H. Ng, Clerk

[cc: Messrs. Salvesen, Walker, Davis, Deegan, Fitzpatrick, Leibensperger, Ms. Jones, Ms. Arowood]

APPENDIX F

Transcript of Trial Proceedings
Held April 1, 1996

Pages 68-69

If your decision is the latter, you will reach the issue of damages. In discussing damages, let me make clear that I'm not attempting to suggest to you what your verdict should be on this or any other issue in the case, but it is easier that I explain the law of damages to you now rather than interrupt your deliberations later with a second set of instructions, should they become necessary.

To assess damages on the Ansins' contract claim, you will have to determine the value of the loss of the Ansins of their rights to these 3,500 shares. The measure of damages on this claim is what the Ansins would have received had the shares been included in the November sale, if you find that the Ansins would, in any event, then sold their interest in River Oaks, or what the Ansins would have eventually received for these shares had they decided not to sell them at that time.

The value that you assign to these 3,500 shares should be consistent with the value of the loss, if any, that you find the Ansins incurred on the sale of the 4,000 remaining shares in November of 1992, assuming, of course, that you find for the Ansins on their claim of fraud.

That loss is measured by what the Ansins should or would have received but for the defendants' fraudulent conduct, less, of course, the value of what they did, in fact, receive.

Let me turn now to the claim of federal securities fraud. To prove a violation of the federal securities laws, the Ansins must establish five things by a preponderance of the evidence:

First, that the defendants used the mails or some other instrumentality of interstate commerce, a telephone, for example, in connection with the purchase of the Ansin stock. As to this element, there is no real dispute and you may accept it as established.

Second, plaintiffs must show that the defendants omitted to disclose material facts in connection with the purchase of the Ansin shares or else made affirmative misrepresentations or both, any one of which would have intended to mislead the Ansins in making their decision to sell.

Third, they must show that the defendants acted knowingly.

Fourth, they must show that they reasonably relied on the defendants' representations in agreeing to sell their stock.

And, fifth, that they suffered damages as a result.

Now, the misrepresentations or omissions the plaintiffs allege induced them to sell their stock in

* * *

Pages 72-73

proof of reliance on omissions is not necessary where materiality has been established.

A plaintiff, as a rule, has a duty to protect himself by exercising reasonable diligence in investigating the truth behind a defendants' representations. However, the more material the misrepresentation, the lighter is the burden on the person who is the target of the deception.

The law assumes that a person who is the intentional target of a material misrepresentation is meant to rely on the deception to his detriment. Consequently, if the statement is material, the burden is on the defendant to persuade you that a plaintiff did not rely on it in making his decision.

Finally, the Ansins must prove they suffered damages because of the defendants' conduct. This means that they must satisfy you they would have not sold their stock in November of 1992 but for the defendants' conduct, or that they would have insisted on a price higher than the one they actually received.

Again, the issue is not hindsight. You must evaluate the Ansins' decision in light of the facts and circumstances that existed at the time that the decision to sell was made.

If you reach the issue of damages, the proper measure, again, is the difference between what the Ansins actually received for their stock and what you believe they would have received had they refused to sell or, instead, insisted on different terms.

What the Ansins received was the $300,000 that River Oaks paid for their stock, plus whatever value assign to the agreement to release Lawrence Ansin from his existing personal guarantees of the company's debt.

Now, the Ansins' claim of common law fraud is very similar in its elements of proof. The Ansins must show the following:

(1) a material misrepresentation or omission by the defendants;

(2) known by the defendants to be false or misleading;

(3) intended by the defendants to deceive the plaintiffs;

(4) and on which the plaintiffs rely to their detriment.

There are differences, however, between the fraud claim under the common law and the claim of a federal securities violation.

Federal securities violation requires evidence of the use of an interstate facility like the mails or telephone, while common law fraud does not. Of more importance is the fact that to prove fraud, a plaintiff

* * *

Pages 84-85

What I stress is that there's no metaphysical significance in the way I've framed any of these questions, that this is something put together in a fashion to try to give some coherence and direction to your deliberations on the issue in the case.

As you can see, there is much that I'm expected to remember in giving you the various explanations that I have of the law of the case, and I find it helpful if I consult with the attorneys just briefly, see if there might have been something that I inadvertently overlooked that I should have said now and let me say this time so I don't have to bring you back to listen to one more item.

So let me meet with the lawyers for just one second, and depending on the outcome of that conversation, I'll appoint a foreperson, and you'll be off to begin your deliberations.

(SIDE BAR CONFERENCE AS FOLLOWS:

THE COURT: Mr. Davis?

MR. DAVIS: If the Court please, I'm concerned that the jury may have the impression that the Ansins -- if they find for the Ansins, that the Ansins would be entitled to share in the fruits of the public offering had they not sold.

I don't -- I think that's contrary to this Court's holding in Hupp v. Dean Witter, 737 F. Supp. 128, a 1990 case, where a defrauded seller argued that he was entitled to

the appreciation.

It's my understanding of the law that the value of what they gave up needs to be found as of the date they surrendered it and not as of the date of some speculative point in the future.

THE COURT: That might be true but for their testimony they would not have sold had they known the different factual circumstances that they claim were withheld from them.

MR. DAVIS: Those were he exactly the facts in Hupp v. Dean Witter.

THE COURT: Well, it's too late for that theory of the case, if it was tried on that basis, and I think that -- I actually like that -- I think the law is better as I've explained it than perhaps that case does.

MR. DAVIS: We also object to fiduciary -- the instruction on fiduciary duty. We don't believe --

THE COURT: What aspect of it?

MR. DAVIS: That aspect of it which suggests that there is any fiduciary duty under Mississippi law in a situation such as this where there is no question of an oppression of a minority interest by majority in a squeeze-out situation.

I don't think this is a squeeze-out situation, and

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 93-12170-RGS

HAROLD S. ANSIN FOUNDATION; PATRICK B. MARAGHY, AS TRUSTEE OF THE ANSIN FOUNDATION; AND RICHARD N. THIELEN AS EXECUTOR OF THE ESTATE OF LAWRENCE J. ANSIN

v.

RIVER OAKS FURNITURE, INC., STEPHEN L. SIMONS, AND THOMAS D. KEENUM, SR.

SPECIAL VERDICT FORM

April 5, 1996

STEARNS, D.J.

A. As to Count I (The Federal Securities Fraud Claim):

1. Have plaintiffs proven by a preponderance of the evidence that defendants violated the Securities Exchange Act by inducing them to sell their 4,000 shares of stock in River Oaks and their shares of River Oaks Realty by any of the following? (Check those, if any, that apply).

a.____ The alleged statement of Stephen Simons that river Oaks Furniture, needed Lawrence Ansin's personal guaranty to maintain its line of credit with the Bank of Mississippi.

b.____ The alleged statement of Thomas Keenum, Jr., in October/November 1992, that R-O Realty stock had no value independent of that of River Oaks.

c.___ The offer by Thomas Keenum in October/November 1992, on behalf of River Oaks, to repurchase that Ansins' River Oaks and R-O Realty Stock for $300,000 and the release of Lawrence Ansin's personal guaranties.

d.__✓__ Defendants alleged failure to disclose prior to purchase of the Ansins' stock that River Oaks was discussing a public offering with JC Bradford Co.

If you have checked any of the above, please answer question 2. Otherwise proceed to Section B.

2. What sum of money will fairly and reasonably compensate the Ansins for their reliance on one or more of the above misrepresentations or omissions in agreeing to sell their 4,000 share of River Oaks and their share of River Oaks Realty?

$ 1,082,400.00
Amount in Figures

one million eighty-two thousand four hundred dollars
Amount in Words

B. As to Count IV (The Common Law Fraud Claim):

3. Have plaintiffs proven by clear and convincing evidence that defendants engaged in common law fraud by inducing them to sell their 4,000 shares of River Oaks and their shares of River Oaks Realty by any of the following? (Check those, if any, that apply).

a.___ The alleged statement of Stephen Simons that River Oaks needed Lawrence Ansin's personal guaranty to maintain its line of credit with the Bank of Mississippi.

b.___ The alleged statement of Thomas Keenum, in October/November 1992, that R-O Realty stock had no value independent of that River Oaks.

c.___ The alleged offer by Thomas Keenum in October/November 1992, on behalf of River Oaks, to repurchase plaintiffs' River Oaks and R-O Realty Stock for $300,000 and the release of Lawrence Ansin's personal guarantees.

d.__✓__ Defendants' alleged failure to disclose prior to purchase of the Ansins' stock that River Oaks was discussing a public offering with JC Bradford Co.

If you have checked any of the above please answer question 4. Otherwise, proceed to Section C.

4. What sum of money will fairly and reasonably compensate the Ansins for their reliance on one or more of the above misrepresentations or omissions in selling their 4,000 share of River Oaks and their shares of River Oaks Realty?

$ 1,082,400.00
Amount in Figures

one million eighty-two thousand four hundred dollars
Amount in Words

C. As to Count II(a) (The Claim Breach of Contract):

5. Have plaintiffs proven by a preponderance of the evidence that River Oaks breached a contract with Harold Ansin when , in 1989, Lawrence Ansin's interest in River Oaks was reduced from 7,500 to 4,000 shares?

Yes ✓

No _____

If your answer is "Yes," please answer question 6. Otherwise proceed to Section D.

6. What sum of money will fairly and reasonably compensate the Ansins for the loss of Lawrence Ansin's 3,500 shares?

$ 1,209,600.00
Amount in Figures

one million two hundred nine thousand six hundred dollars
Amount in Words

D. As to Count III (The Breach of Fiduciary Duty Claim):

7. Did defendants Stephen Simons and/or Thomas Keenum breach a fiduciary duty owed by a dominant shareholder to a minority shareholder by any of the following?

a.___ The alleged statement of Stephen Simons that River Oaks needed Lawrence Ansin's personal guaranty to maintain its line of credit with the Bank of Mississippi.

b.___ The alleged statement of Thomas Keenum, in October/November 1992, that R-O Realty stock had no value independent of that River Oaks.

c.___ The alleged offer by Thomas Keenum in October/November 1992, on behalf of River Oaks, to repurchase plaintiffs' River Oaks and R-O Realty Stock for $300,000 and the release of Lawrence Ansin's personal guaranties.

d. ✓ Defendants' alleged failure to disclose prior to purchase of the Ansins' stock that River Oaks was discussing a public offering with JC Bradford Co.

e. ✓ The failure to offer the Ansins the opportunity to participate in the ownership of River Wood Products.

If you have checked any of the above, please answer question B. Otherwise, proceed to Section E.

8. What sum of money will fairly and reasonably compensate plaintiffs for the defendants' breach of fiduciary duty?

$ 16, 440.00
Amount in Figures

Sixteen thousand four hundred forty
Amount in Words

Please answer question 9.

9. If you have checked 7(e), what portion of the damages awarded at question 8 is intended to compensate plaintiffs for the loss of the opportunity to participate in the ownership of River Woods Products?

$ 16, 440.00
Amount in Figures

Sixteen thousand four hundred forty
Amount in Words

If you have awarded damages in response to question 4, 6, and/or 8, please answer question 10. Otherwise you have reached a verdict.

E. Punitive Damages

10. Does the jury award the Ansins punitive damages?

Yes ✓

No _____

If your answer is "Yes," please answer question 11. If the answer is "No," you have reached a verdict.

11. What amount of punitive damages does the jury award?

a. As against River Oaks:

$ 0
Amount in Figures

zero
Amount in Words

b. As against Stephen Simons:

$ 25,000.00
Amount in Figures

twenty five thousand
Amount in Words

c. As against Thomas Keenum:

$ 100,000.00
Amount in Figures

one hundred thousand
Amount in Words

I certify that the foregoing are the unanimous answers of the jury.

/s/ Mary Elaine (unreadable)
Foreperson

Dated: 4/8/96

APPENDIX H

SECURITIES AND EXCHANGE ACT OF 1934

§78j. Manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§78bb. Effect on existing law.

(a) Addition of rights and remedies; recovery of actual damages; State securities commissions

The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Except as otherwise

specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules or regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidates any put, call straddle, option privilege, or other security, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such instrument, if such instrument is traded pursuant to rules and regulations of a self-regulatory organization that are filed with the Commission pursuant to section 78s(b) of this title.

SECURITIES AND EXCHANGE COMMISSION RULES

§240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat.891; 15 U.S.C. 78j)

[13 F.R. 8183, Dec, 22, 1948, as amended at 16 F.R. 7928, Aug. 11, 1951]